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1 The Newport Company, *Petitioner,*
vs.
Commissioner of Internal Revenue, *Respondent.*
} Docket No. 28200

Appearances:

For Petitioner:
Chas. D. Hamel, Esq.,
R. S. Doyle, Esq.,
Edw. H. McDermott, Esq.,
Lee I. Park, Esq.,
Benj. H. Saunders, Esq.,
Chas. F. Fawsett, Esq.,
L. A. Manchester, Esq.,

For Respondent:
J. Roy Johnston, Esq.,
J. A. Lyons, Esq.,

DOCKET ENTRIES:

1927

May 7—Petition received and filed. Taxpayer notified.
May 9—Copy of petition served on General Counsel.
June 6—Amended petition filed by taxpayer.
June 7—Copy of amended petition served on General Counsel.
June 30—Answer to amended petition filed by General Counsel.
July 5—Copy of answer served on taxpayer—General Calendar.

1928

Apr. 2—Motion to file amended petition filed by taxpayer, amendment tendered.
Apr. 4—Motion granted.
Apr. 7—Copy of motion and amendment to amended petition served on General Counsel.
May 21—Answer to amendment to amended petition filed by General Counsel. Copy served 5/22/28.
Dec. 11—Hearing set Feb. 12, 1929.
Dec. 31—Application for order to take depositions filed by taxpayer.

1929

Jan. 8—Order to take depositions of James E. Kupperian entered.

Jan. 24—Depositions of James E. Kupperian filed (3). Copies serves by Board.

Jan. 25—Copy of depositions served on General Counsel.

Feb. 2—Notice of appearance of Chas. D. Hamel, Richard S. Doyle, Edw. H. McDermott, Lee I. Park, Benj. H. Saunders as counsel for taxpayer filed.

Feb. 1—Motion to place on reserve calendar filed by taxpayer. 2/4/29 granted.

2 1929

Dec. 10—Hearing set Jan. 21, 1930.

Dec. 31—Motion for production of records filed by General Counsel.

1930

Jan. 3—Order that petitioner produce certain documents at hearing entered.

Jan. 6—Motion for leave to file amended answer, amendment tendered, filed by General Counsel. 1/8/30 granted.

Jan. 7—Application for subpoena duces tecum filed by General Counsel.

Jan. 7—Subpoenas (3) issued.

Jan. 20—Application for subpoena duces tecum filed by taxpayer.

Jan. 20—Subpoena duces tecum issued.

Jan. 21 & 22—Hearing had before Stephen J. McMahon, Division 16. Briefs due March 1, 1930.

Jan. 28—Transcript of hearing of Jan. 21 and 22, 1930 filed.

Mar. 1—Brief filed by General Counsel.

Mar. 1—Proposed findings of fact filed by taxpayer.

Mar. 1—Brief filed by taxpayer.

Mar. 6—Proposed findings of fact filed by taxpayer.

Mar. 10—Motion for Board to set time for oral argument filed by General Counsel.

Mar. 24—Motion for leave to file reply brief, with reply brief, filed by taxpayer.

Mar. 27—Motion that if taxpayer be allowed to file reply brief respondent be allowed 60 days to file reply brief and to withdraw motion of 3/10/30 filed by General Counsel.

Mar. 28—Reply brief filed by taxpayer.

Mar. 28—Respondent's motion to file briefs granted to April 26, 1930.

Apr. 26—Brief filed by General Counsel.

1931.

Mar. 19—Findings of fact and opinion rendered—Stephen J. McMahon, Division 16. Judgment will be entered for the petitioner.

Mar. 21—Decision entered—Stephen J. McMa' n, Division 16.

Sept. 18—Petition for review by U. S. Circuit Court of Appeals (7) with assignments of error filed by General Counsel.

Oct. 9—Proof of service filed.

1932.

July 11—Copy of order from U. S. Circuit Court of Appeals (7) extending time for 60 days from July 7, 1932 to file transcript filed.

Aug. 6—Statement of evidence lodged.

Aug. 8—Notice of lodgment of statement of evidence; hearing set 8/17/13—proof of service thereon.

3 Aug. 15—Motion for extension to Aug 31, 1932 to file objections to statement and to continue hearing to that date filed by taxpayer. 8/16/32 granted to Aug. 24, 1932.

Aug. 20—Copy of order from U. S. Circuit Court of Appeals (7) extending time to Oct. 15, 1932 to settle evidence and transmit record filed.

Aug. 22—Stipulation for extension to Nov. 15, 1932 to complete statement filed. (Approve by Judge).

Aug. 22—Motion for continuance of hearing to Oct. 3, 1932 filed by taxpayer.

Aug. 23—Order that time be extended to Oct. 3, 1932 for filing objections to the statement of evidence and extending time to Oct. 5, 1932 for hearing on settlement of the record entered.

Sept. 20—Praecipe filed—proof of service thereon.

Sept. 24—Respondent's objections and proposed amendments to petitioner's statement of evidence filed by taxpayer.

Sept. 24—Proof of service filed.

Oct. 5—Hearing had before Mr. McMahon on approval of statement of evidence. Agreed statement of evidence to be filed. C. A. V. Respondent's memorandum in support of objections and petitioner's answer to objections filed.

Oct. 19—Transcript of hearing of Oct. 5, 1932 filed.

Oct. 27—Order that petitioner's second objection to the respondent's proposed "Statement of Evidence" be sustained and that there be stricken certain lines entered.

Nov. 2—Memorandum of law filed by General Counsel.

Nov 2—Exceptions and motion to vacate order of 10/27/32 filed by General Counsel.

Nov. 5—Supplemental praecipe filed — proof of service thereon.

Nov. 7—Hearing before Mr. McMahon on approval of statement of evidence. Adjourned to Nov. 10, 1932.

Nov. 9—Agreed statement of evidence lodged.

Nov. 9—Order denying motion filed 11/2/32 entered.

Nov. 10—Motion for extension to Nov. 25, 1932 for transmission and delivery of record and to settle evidence filed by General Counsel.

Nov. 10—Hearing had before S. J. McMahon, Division 16, on approval of statement of evidence. Continued to Nov. 17, 1932. Extension of time for sending up record until Dec. 1, 1932.

Nov. 10—Order of continuance to Nov. 17, 1932 entered.

Nov. 11—Motion to substitute "certificate of counsel" in lieu of page 54 in statment of evidence filed by General Counsel.

Nov. 11—Transcript of hearing of Nov. 7, 1932 filed.

Nov. 14—Order enlarging time to Dec. 1, 1932 for preparation of evidence and delivery of record entered.

Nov. 14—Transcript of hearing of Nov. 10, 1932 filed.

4 Nov. 17—Hearing had before Mr. McMahon on approval of statement of evidence. Continued to Nov. 22, 1932.

Nov. 17—Order of continuance of Nov. 22, 1932 for further hearing on approval of the statement of evidence entered.

Nov. 19—Transcript of hearing of Nov. 17, 1932 filed.

Nov. 22—Order denying motion to substitute entered.

Nov. 22—Order that second "Statement of Evidence" lodged on 11/9/32 be corrected entered.

Nov. 25—Agreed statement of evidence approved and ordered filed.

Nov. 29—Order enlarging the time for transmission and delivery of the record to Dec. 5, 1932, entered.

5 UNITED STATES BOARD OF TAX APPEALS. Filed June 6, 1927.

The Newport Company,
Petitioner,
vs.
Commissioner of Internal Revenue,
Respondent.
} Docket No. 28200.

AMENDED PETITION.

Filed June 6, 1927.

The above named petitioner by its amended petition hereby petitions for a redetermination of the proposed assessment against it as a transferee of the assets of the Newport Chemical Works, Inc., Milwaukee, Wisconsin, for income and profits taxes in the amount of $43,527.25 claimed to be due from the Newport Chemical Works, Inc. for the calendar year 1917 as set forth by the Commissioner of Internal Revenue in his notice of deficiency (Bureau Symbols IT:CR:G-5-60D SMC-280) dated March 14, 1927, and as the basis of its proceeding alleges as follows:

6

I.

The petitioner is a corporation duly organized as such under the laws of Delaware with its principal place of business at Carrollville, Wisconsin, and with its post office address, Box 1582, Milwaueke, Wisconsin.

II.

The notice of deficiency (a copy of which is attached and marked Exhibit "A") referred to above was mailed to the petitioner on the 14th day of March, 1927.

III.

The taxes in controversy are income and profits taxes claimed to be due from the Newport Chemical Works, Inc. for the calendar year 1917 and the amount of such taxes in dispute is the entire amount stated in said notice, to-wit, the sum of $43,527.25.

IV.

The determination of tax set forth in said notice is based upon the following errors: The Commissioner erred in his said determination,

7 1. In making such determination of liability of the petitioner as a transferee of assets of the Newport Chemical Works, Inc. referred to in said notice without taking into account as an offset against such claimed liability claims for refund against the government to which as petitioner is informed and believes it is entitled in an amount sufficient to offset and cancel said sum of $43,527.25, if the petitioner is liable for said sum as a transferee of the assets of said Newport Chemical Works, Inc.

2. In disallowing as a deduction from taxable income the sum of $15,891.72 as organization expenses on the ground that this amount was deducted by petitioner from its income in 1927, whereas $11,335.69 of this amount was never deducted by petitioner from its income, with the result that said sum of $11,335.69 has been erroneously added by the department to the petitioner's taxable income for the year 1917.

3. Because the right of the Commissioner to make such proposed assessment or to enforce the same against the petitioner or said The Newport Chemical Works, Inc. at the time such determination was made was barred by the statute of limitations applicable thereto.

8 The facts upon which the petitioner relies as the basis of this proceeding are as follows:

(1) Said The Newport Chemical Works, Inc. prior to on or about March 1, 1920, was a comporation organized and existing under the laws of Maine. The Newport Mining Company prior to on or about the same date, was likewise a corporation organized and existing under the laws of Maine. On or about the 31st of July, 1919, portions of the assets of said The Newport Mining Company were transferred to The Steel & Tube Company of America, a corporation organized and at that time existing under the laws of Delaware, and all of the remainder of its assets were at or about the same time transferred to the petition.

In connection with the transfer of the assets of said The Newport Mining Company as above stated, certain of the liabilities of said Company were assumed by said The Steel & Tube Company of America and the remainder of its liabilities by this petitioner.

All claims which said The Newport Mining Company had at the time of such transfer of its assets for refunds from the Government of the United States by reason of overpayments of income and profits taxes or upon any other account constituted assets of said The Newport Mining Company which passed by the transfers of assets above referred to. As petitioner is advised and believes, and therefore avers the fact to be, it has since been determined that at the time of said transfers of assets by said The Newport Mining Company it had overpaid the taxes justly due and owing from it to the Government in a large amount, to-wit, upards of the sum of $150,000.00 and at the time of such transfers was entitled to refunds from the Government of the United States of not less than said sum of $150,000.00.

The precise amount of such refund to which petitioner as one of the transferees of the assets of said The Newport Mining Company is entitled as between it and said The Steel & Tube Company has not yet been definitely determined and for this reason petitioner is unable to state definitely the amount of such refund to which it is now or was at the time of the determination referred to in said notice entitled, but as petitioner is informed and believes the amount of such refund to which the petitioner is entitled as one of the transferees of the assets of said The Newport Mining Company is in excess of said sum of $43,527.25 stated in said notice, Exhibit "A", and petitioner hereby pleads and claims its right to such refund as an offset against any liability it may be under to the Government of the United States for said sum of $43,527.25 or any part thereof.

(2) In its computation of the taxable income of petitioner for the year 1917 the department added the sum of $15,034.22 upon the ground as stated in its thirty day letter that this amount consisting of organization expenses was erroneously deducted by the petitioner from its taxable income for 1917. The facts in relation to this are as follows:

Said sum of $15,891.72 was the balance of the organization expense account at December 31, 1916. In June, 1917, $15,034.22 of said balance was transferred to Development Account, and in December, 1917, this amount was written off, $11,335.69 being charged to Depreciation Reserve and was not deducted by petitioner from income. The result is that the petitioner is entitled to a deduction of $11,335.69 from its taxable income for the year 1917 as computed by the department and erroneously added by the department.

The details of the adjustment which resulted in such er-

roneous addition to the petitioner's taxable income for the year 1917 will be found in the letter of the department
11 addressed to the Newport Mining Company referred to in the statement attached to the sixty day letter, hereto annexed.

(3) As petitioner is informed and believes more than six years had elapsed at the time of the determination of said alleged liability referred to in said notice, Exhibit "A" since the income and profits tax return of the said Newport Chemical Works, Inc. for the year 1917 was filed and any liability of said Newport Chemical Works Inc. for income or profits taxes for the year 1917 was barred at the time of said determination by the Statute of Limitations applicable thereto.

Wherefore petitioner prays that this Board may hear this proceeding and redetermine the question of the tax liability of said Newport Chemical Works Inc. as claimed in said notice, Exhibit "A", and the liability of the petitioner as a transferee of the assets of said Newport Chemical Works Inc. as claimed in said notice, and that this Board grant to the petitioner such other and further relief in the premises to which it may be entitled.

CHARLES F. FAWSETT,
Counsel for Petitioner.

P. O. Address:
Room 928—425 East Water Street,
Milwaukee, Wisconsin.

12 State of Wisconsin } ss.
Milwaukee County. }

C. C. BRETT being first duly sworn says that he is one of the general officers, to-wit: the Vice-President of The Newport Company, the petitioner making the foregoing petition, and makes this verification as such officer and is duly authorized so to do; that he has read the foregoing petition and is familiar with the statements contained therein and that the facts therein stated are true except as to those stated to be on information and belief and those facts he believes to be true.

C. C. BRETT.

Subscribed and sworn to before me this 4th day of June, A. D. 1927.

ELLA PORT,
Notary Public, Milwaukee County, Wisconsin.

(Seal)

My commission expires June 8, 1930.

13 TREASURY DEPARTMENT.

Washington.

March 14, 1927.

IT:CR:G-5-60D
SMC-280
The Newport Company,
Milwaukee, Wisconsin.

Sirs:

As provided in Section 280 of the Revenue Act of 1926, there is proposed for assessment against you the amount of $43,527.25 constituting your liability as a transferee of the assets of the Newport Chemical Works, Milwaukee, Wisconsin, for income and profits taxes in the amount of $43,527.25 due from The Newport Chemical Works for the year 1917 as shown in the attached statement.

In accordance with the provisions of Section 274 of the Revenue Act of 1926, you are allowed 60 days from the date of mailing of this letter within which to file a petition for the determination of this deficiency. Any such petition must be addressed to the United States Board of Tax Appeals, Earle Building, Washington, D. C., and must be mailed in time to reach the Board within the 60-day period, not counting Sunday as the sixtieth day.

Where a taxpayer has been given an opportunity to file a petition with the United States Board of Tax Appeals and has not done so within the 60 days prescribed and an assessment has been made, or where a taxpayer has filed a petition and an assessment in accordance with the final decision on such petition has been made, the unpaid amount of the assessment must be paid upon notice and demand from the Collector of Internal Revenue. No claim for abatement can be entertained.

If you acquiesce in this determination and do not desire to file a petition with the United States Board of Tax Appeals, you are requested to execute a waiver of your right to file a petition with the United States Board of Tax Appeals on the inclosed Form A, and forward it to the Commissioner of Internal Revenue, Washington, D. C. for the attention of IT:CR:G-5-60D-SMC-280. If in the event that you acquiesce in

a part of the determination, the waiver should be executed with respect to the items to which you agree.

Respectfully,
D. H. BLAIR,
Commissioner,
By C. R. NASH,
Assistant to the Commissioner.

Inclosures:
Statement
Form A

14 IT:CR;G-5-60D Form A.
SMC-280

In re The Newport Company,
Milwaukee, Wisconsin.

WAIVER OF RIGHT TO FILE A PETITION WITH THE U. S. BOARD OF TAX APPEALS.

The undersigned taxpayer hereby waives the right to file a petition with the U. S. Board of Tax Appeals under Section 274 (a) of the Revenue Act of 1926 and consents to the assessment and colletion of a deficiency in tax for the year 1917 aggregating $43,527.25.

This represents the undersigned taxpayer's liability under Section 280 of the Revenue Act of 1926, as a transferee of the property of Newport Chemical Works, Milwaukee, Wisconsin, for unpaid income and profits taxes in the amount of $43,527.25 due from Newport Chemical Works for the year 1917.

.....
(Name)

.....
(Address)

(Corporate seal to be affixed. If no seal, so state)
Date .....
By .....

Note: This waiver does not extend the statute of limitations for refund or assessment of tax, and is not an agreement as provided under Section 1106 of the Revenue Act of 1926.

15 IT:CR:G-5-60D
ELS-280

STATEMENT OF RETURNS EXAMINED
AND
RESULTING TAX LIABILITY.

Returns Examined

Company	Year	Form	Date Filed
Newport Chemical Works, Milwaukee, Wisconsin.	1917	1031 and 1103	April 1, 1918

Tax Liability
(Section 280 of the Revenue Act of 1926)

Transferee Company	Year	Deficiency in Tax
Newport Company, Milwaukee, Wisconsin,	1917	$43,527.25

Details of the adjustments resulting in the above deficiency are contained in schedules attached to a separate communication addressed to Newport Mining Company, Milwaukee, Wisconsin.

A waiver executed by the Newport Chemical Works on December 23, 1924 was effective until April 1, 1926.

The records of this office indicate that the Newport Chemical Works was dissolved and the assets transferred to you on or about March 1, 1920.

16 * * * (Caption) * * *

Filed Apr. 4, 1928.

AMENDMENT TO AMENDED PETITION.
Filed April 4, 1928.

The above named petitioner with the consent of the Commissioner to be filed herewith, hereby amends its amended petition in the above entitled proceeding as follows:

1. As an additional assignment of error, the petitioner says that the Commissioner erred in his determination of liability of the petitioner as a transferee of assets of The New port Chemical Works Inc. as stated in the notice of deficiency dated March 14, 1927, (Bureau Symbols, IT:CR:G-5-60D SMC-280) attached to said amended petition in that Section 280 of the Revenue Act of 1926 under which said determination of libaility was made is in violation of Section 1 of Article III of the Constitution of the United States and of Article V of the amendments of said Constitution.

2. In support of the above additional assignment of error, the petitioner alleges that said determination of liability was

made, and the assessment referred to in said notice of de-
17 ficiency is proposed to be made, against the petitioner as transferee of assets of said The Newport Chemical Works under and by virtue of Section 280 of the Revenue Act of 1926. All of the assets of said Newport Chemical Works Inc. were transferred to the petitioner in the year 1919 prior to the enactment of said Section 280 of the Revenue Act of 1926 and if said Section 280 of said Revenue Act is held to be applicable to petitioner as transferee of the assets of said Newport Chemical Works Inc., the petitioner claims and asserts that said Section 280 is unconstitutional and void because in violation of Section 1 of Article III of the Constitution of the United States and of Article V of the amendments to said Constitution.

3. Except as herein amended the petitioner reaffirms in all respects its said amended petition on file in the above entitled proceeding.

(Signed) CHARLES F. FAWSETT,
Counsel for Petitioner.

P. O. Address: 425 E. Water St., Milwaukee, Wisconsin.

State of Wisconin }
Milwaukee County } ss.

JAMES E. KUPPERIAN being first duly sworn, deposes and says that he is an officer, to-wit, Vice-President of The Newport Company, the petitioner making the foregoing petition; that he makes this verification as such officer in behalf of the petitioner, and is duly authorized so to do; that he has read said petition and is familiar with the contents thereof, and that the same is true of his own knowledge except as to matters therein stated upon information and belief, and as to those matters he believes it to be true.

(Signed) JAMES E. KUPPERIAN.

Subscribed and sworn to before me this 23rd day of February, A. D. 1928.

(Signed) ELLA PORT,
(Seal) *Notary Public, Milwaukee County, Wisconsin.*

My Commission expires June 8, 1930.

18 * * (Caption) * * Filed Jan. 8, 1930.

AMENDED ANSWER TO AMENDED PETITION AND AMENDMENT TO AMENDED PETITION.

Filed Jan. 8, 1930.

Comes now the respondent, Commissioner of Internal Revenue, by his attorney, C. M. Charest, General Counsel, Bureau of Internal Revenue, and, by leave of the Board, files this amended answer to the Amended Petition and to the Amendment to Amended Petition filed by the petitioner herein, and for amended answer says:

I, II and III.

The allegations contained in paragraphs one, two and three of the Amended Petition are admitted, and so much of paragraph two of the Amendment to Amended Petition is admitted as alleges that all of the assets of said The Newport Chemical Works, Incorporated, were transferred to petitioner in the year 1919.

IV.

It is denied that respondent erred as alleged in subparagraphs (1), (2) and (3) of paragraph four of the
19 amended petition or as alleged in paragraphs 1 and 2 of the Amendment to Amended Petition, and respondent denies generally and specifically each and every allegation contained in taxpayer's Amended Petition and Amendment to Amended Petition not herein admitted, qualified, or denied.

V.

In answer to the statement of facts upon which the petitioner relies, subparagraphs (1), (2), and (3) of the fifth paragraph to the Amended Petition, it is admitted that the Newport Mining Company and the Newport Chemical Works, Incorporated, were corporations and that all of the assets of the Newport Chemical Works, Incorporated, were transferred to the Newport Company as alleged. For lack of sufficient information, respondent neither admits nor denies any of the other facts alleged.

And for further answer respondent says:

(a) That, though the notice to the petitioner of the determination of the liability referred to in petitioner's "Exhibit

A" for the taxable year 1917, was not mailed until March 14, 1927, the assessment and/or collection thereof from the Newport Company, as transferee of the assets of the Newport Chemical Works, Incorporated, is not barred by the Statute of Limitations for the reason that both the petitioner, as transferee and successor in interest to the Newport Chemical Works, Incorporated, and said The Newport Chemical Works, Inorporated, had, prior to the maling of said notice on said March 14, 1927, each consented in writing, as provided by law, to the making of the assessment and the collection
20 of the tax involved, within the time of the proposed determination, which consent had been accepted in writing by respondent, Commissioner of Internal Revenue.

That respondent made a proposed determination within the five year period from the date of filing of the income tax return of the Newport Chemical Works, Incorporated, for the taxable year 1917, but at the urgent request of said The Newport Company, the petitioner, further consideration was given to the matter from time to time and waivers were executed from time to time by the officers and directors of said The Newport Company for and in behalf of the Newport Chemical Works, Incorporated, of which they were also officers, and for and in behalf of said The Newport Company, under the corporate seal of each of said corporations, and with the express assurance of said The Newport Company that they were fully authorized and empowered to execute said waivers for and in behalf of each of the said corporations.

That the respondent, Commissioner of Internal Revenue, accepted said waivers in good faith, relying upon said assurance of The Newport Company, through its officers and directors, and from time to time granted extensions for the purpose of enabling the taxpayer to present further evidence as to its liability, with the result that there was a material reduction in the amount of the deficiency as finally determined and as originally proposed and the taxpayer was granted a prolonged extension of time in which to pay the deficiency in tax.

21 That the said waivers having been executed as aforesaid under the corporate seals of the respective corporations and with the representations and assurances above stated, by officers and directors who were alleged to have fully authorized and empowered to act for each of the corporations concerned, said The Newport Company is now estopped and

may not be heard to deny the validity of any such waivers, even though the execution thereof may have not been fully authorized, which is expressly denied by respondent.

(b) Further answering respondent says that at all times material herein, the Newport Chemical Works, Incorporated, was duly authorized to transact business and to enter into contracts and agreements relative thereto in the State of Wisconsin, and complied with the foreign corporation laws of said State with reference to doing business therein, and by reason thereof was duly authorized to and did maintain its principal office and place of business at or near the city of Milwaukee in said State.

(c) That on or about said July 30, 1919, and at all times material herein, said The Newport Chemical Works, Incorporated, had all of its principal assets and property within said state of Wisconsin, and on or about said date entered into a contract or agreement with The Newport Company, a corporation organized under the laws of Delaware, The Newport Mining Company, a corporation organized under the laws of Maine, The Gogebic Steel Company, a corporation organized under the laws of Indiana, and the Western States Coke
22 Company, a corporation organized under the laws of Minnesota, under the terms of which The Newport Company, a corporation with its principal office and place of business at or near Milwaukee, Wisconsin, took over all the assets and outstanding capital stock and assumed all the liabilities of said The Newport Chemical Works, Incorporated, Gogebic Steel Company, and Western States Coke Company, which said corporations were thereby consolidated and merged into the said The Newport Company, which issued its capital stock to the stockholders of said Newport Chemical Works, Incorporated, Goebic Steel Company, and Western States Coke Company in exchange for said property in those companies and in the same aggregate par value as the capital stock formerly held in said companies aforesaid, and to the respective stockholders in said merged companies in accordance with their respective relative interests in each of the companies aforesaid, the assets and property of which were transferred to said The Newport Company.

That, after the above consolidation and merger which was made effective on or about said July 30, 1919, the said Newport Chemical Works, Incorporated, had no assets or property and its entire business was taken over and operated and carrier on by said The Newport Company in the State of Wisconsin and under the laws of Wisconsin.

That at the time of said consolidation and merger said The Newport Chemical Works, Incorporated, had assets which were so transferred to said The Newport Company in exchange for its capital stock issued as above-stated, the
23 value of which was sufficient to cover the liability for the proposed deficiency in income tax for the taxable year 1917 in the amount of $43,527.25, with interest thereon, which has been proposed for assessment against The Newport Company, as transferee, under Section 280 of the Revenue Act of 1926 in this proceeding.

(d) And for further answer respondent says that The Newport Company, the petitioner, is before this Board having invoked the provisions of said Section 280 of the Revenue Act of 1926 to secure a redetermination of the deficiency determined against it, as set forth in the said letter from the Commissioner dated March 14, 1927, and that the petitioner, therefore, is estopped to question, and may not question the constitutionality or the validity of said Section 280 of the Revenue Act of 1926.

Wherefore it is prayed that the taxpayer's petition be dismissed and the appeal be denied.

C. M. CHAREST,
General Counsel,
Bureau of Internal Revenue.

Of Counsel:
J. E. MATHER,
J. R. JOHNSTON,
Special Attorneys,
Bureau of Internal Revenue.
JRJ:MSP
1-4-30

Statement of Evidence filed Nov. 25, 1932.

57 * * (Caption) * *.

STATEMENT OF EVIDENCE.

Lodged Nov 9-1932.
Filed Nov 25 1932.

The following is a statement of the evidence in narrative form, insofar as practicable, in the above-entitled cause:

This cause came on for hearing before the Honorable Stephen J. McMahon, Member of the United States Board of Tax Appeals, on January 21 and 22, 1930, there being present the petitioner by its attorney, Chas. F. Fawsett, R. S.

Doyle, and L. A. Manchester, and the respondent by his attorneys, J. R. Johnston and J. A. Lyons.

After opening statements by counsel for the respective parties, the following preliminary matters occurred:

58 The following colloquy was had between counsel for the respective parties:

Mr. Lyons: "Mr. Fawsett, is it agreed that the net value of the assets which the petitioner took from the taxpayer company is in excess of the tax liability involved in this case?"

Mr. Fawsett: "Yes sir, I will state for the record that the petitioner concedes that in the middle of the year 1919 the Newport Chemical Works, Incorporated, the taxpayer in this case, transferred all of its assets to the Newport Company, a corporation which was presently organized under the laws of Delaware, in consideration of the issuance by the Newport Company of its stock to the stockholders of the Newport Chemical Works, Incorporated, and in connection with that transfer, and as a part of the consideration, assumed all the liabilities of the Newport Chemical Works, Incorporated. We also concede, for the purpose of this case only, that the value of the assets which were so transferred and received by the Newport Company was materially in excess of the amount of the deficiency claimed in this case."

The Member: "Now are we to construe your statement as a stipulation to that effect?"

Mr. Lyons: "That is my understanding, your Honor."

Mr. Fawsett: "That is the purpose of the statement. That is our understanding with Mr. Lyons, counsel for the Government."

The Member: "The stipulation will be accepted."

Thereupon, further additional facts were stipulated as true and as a part of the evidence in the case, as follows:

That the item of $11,333.69, referred to in the petitioner's amended petition, paragraph 2, as erroneously added back by the Department to the petitioner's income, was added back by the Department in error, and that the taxable income as finally determined by the Department was, by reason thereof, in excess of what it should have been to that extent.

59 That for the taxable year 1917, the Newport Mining Company, the Newport Chemical Works, Incorporated of Maine, and the Dunn Iron Mining Company, were affiliated companies; that the Newport Chemical Works, Incorporated, originally filed a separate income tax return, Form

1031, and a separate excess profits tax return, Form 1103; that the Newport Mining Company and the Dunn Iron Mining Company filed a consolidated excess profits tax return for that year under the provisions of the Act of October 3, 1917; that at the request of the representatives of the various affiliated companies in the name of which the income and excess profits tax returns were filed, the Commissioner later determined that the Newport Mining Company, the Dunn Iron Mining Company, and the Newport Chemical Works, Incorporated, were affiliated for the taxable year 1917 for excess profits tax purposes only, and in this proceeding the Newport Mining Company appeared as the parent company.

Thereupon the petitioner offered in evidence the income and profits tax returns of the Newport Chemical Works, Incorporated for the calendar year 1917, the Collector's stamp thereon showing receipt by the Collector of Internal Revenue at Milwaukee, Wisconsin, on April 1, 1918. These returns show the address of the taxpayer as 1112 First National Bank Building, Milwaukee, Wisconsin, and are signed and verified by H. J. Schlesinger, President and H. H. Springford, Acting Treasurer. They show income tax liability of $18,405.65 and excess profits tax liability of $12,892.03. Petitioner also offered in evidence a letter from the Collector of Internal Revenue at Milwaukee, Wisconsin dated January 18, 1930, addressed to the Newport Chemical Works, Incorporated, Milwaukee, Wisconsin, and stating that its income tax return for 1917 was filed on April 1, 1918. Each of the above documents, (petitioner's Exhibits 1 and 2) was admitted without objection by the respondent. The material portions thereof are as above set out.

Thereupon, petitioner offered in evidence duly authenticated copies of the dissolution proceedings, and decrees in dissolution, each entered March 1, 1920, of the Newport Mining Company and the Newport Chemical Works, Incorporated, in the Supreme Judicial Court of Maine. These
60 were received without objection as petitioner's Exhibits 3 and 4. The material portions of petitioner's Exhibit No. 4, the dissolution proceedings of Newport Chemical Works, Incorporated, are as follows:

"STATE OF MAINE

"Cumberland, ss.

Supreme Judicial Court .In Equity

Edward G. Wilmer

vs.

Newport Chemical Works, Inc.

"Edward G. Wilmer of Milwaukee, in the County of Milwaukee and State of Wisconsin, complains against Newport Chemical Works, Inc., a corporation created by and existing under the laws of the State of Maine and located at Portland, in said County of Cumberland, and says:

"First. That the plaintiff is an officer of said defendant corporation, to wit, the Vice-President thereof.

"Second. At a meeting of the stockholders of said corporation legally called therefor and held at said Portland on the Thirtieth day of August, 1919, at which meeting all the stockholders of said corporation were present in person or by proxy and voted in the affirmative, it was voted as follows:

"Be It Resolved that the stockholders of this corporation do hereby vote to dissolve this company and that the necessary steps be taken to bring about the dissolution thereof. For that purpose any officer or stockholder of this company is hereby authorized to institute and carry on such suit or other proceeding as may be necessary for the purposes of such dissolution.'

"Third. That there are existing liabilities against said corporation and no existing assets thereof, requiring distribution among the stockholders.

"Wherefore, the plaintiff prays:

"That said defendant corporation may be dissolved and terminated and that the plaintiff may have such other and further relief as the circumstances of this case may require.

"And may it please this Honorable Court to issue its subpoena to the said Newport Chemical Works, Inc., commanding it to appear before this Court and answer to this bill of complaint, but not under oath, the oath thereto being expressly waived, at the and to abide the orders and decrees of this Honorable Court thereon.

EDWARD G. WILMER,
By ROGER V. SNOW
His Attorney."

SNOW AND SNOW
Solicitors for Plaintiff."

61 "STATE OF MAINE

"Cumberland, ss.

Supreme Judicial Court In Equity.

Edward G. Wilmer

vs.

Newport Chemical Works, Inc.

"On the foregoing bill of complaint, it is ordered, that notice of the pendency thereof be given to the said defendant, Newport Chemical Works, Inc., by giving to it in hand an attested copy of said bill and of this order thereon fourteen days at least before the fourth day of February, 1920, that it may then appear at the Court House in Portland, in our said County of Cumberland at two o'clock in the afternoon of said day, then and there to answer to said bill and abide the judgment of said Court thereon.

"And it is further ordered that it file with the Clerk of said Court for said County of Cumberland within thirty days after the day above named for its appearance, its demurrer, plea or answer to said bill, if any it has.

Dated at Portland, Jan. 20th, 1920.

SCOTT WILSON

Justice Supreme Judicial Court."

"STATE OF MAINE

"Cumberland, ss.

Supreme Judicial Court In Equity

Edward G. Wilmer

vs.

Newport Chemical Works, Inc.

"The answer of the Newport Chemical Works, Inc., a corporation organized under the laws of the State of Maine, which answers and says:

"That it admits all the averments of the bill filed in the above entitled cause and prays that said corporation may be dissolved as prayed for.

NEWPORT CHEMICAL WORKS, INC.

By JOHN H. PIERCE

Solicitor.

State of Maine,

Cumberland, ss.

February 13th, 1920.

"Personally appeared the above named John H. Pierce, solicitor for the defendant corporation in the above matter, and made oath that the allegations in the said plaintiff's

bill and in this answer are true to the best of his knowledge and belief.

Before me,
FRANK H. PURINTON
Justice of the Peace."

62 "STATE OF MAINE
"Cumberland, ss.
Supreme Judicial Court In Equity
Edward G. Wilmer
vs.
Newport Chemical Works, Inc.

"This cause came on and was heard upon bill and answer, and it appearing to the Court that the stockholders of the defendant Company at a duly called meeting voted unanimously in favor of dissolving the defendant Company, and that the defendant Company has no debts and no assets; it is hereby

"Ordered, Adjudged and Decreed: That said Newport Chemical Works, Inc. be dissolved without the appointment of a trustee or receiver.

Dated March 1st, 1920.

SCOTT WILSON
Justice Supreme Judicial Court

Seen and agreed to
JOHN H. PIERCE
Solicitor for Defendant"

Petitioner's Exhibit No. 3, is identical in all essential respects with Exhibit No. 4, above, except that it pertains to the Newport Mining Company and paragraph Third thereof reads as follows, whereas the same numbered paragraph in petitioner's Exhibit No. 4 is as set out above:

"Third. That there are no existing liabilities against said corporation and no existing assets thereof, requiring distribution among the stockholders."

Thereupon, the petitioner offered in evidence a certified copy of the Statute of Maine, Section 81, Revised Statutes, Chapter 47, which was admitted. Since it has been agreed by counsel for the respective parties that the reviewing court may take judicial notice of this statute, and other state statutes relied upon by the respective parties, such statutes are not set out herein.

Thereupon, counsel for the respective parties conceded and agreed, for the record, that the Newport Chemical

Works, Incorporated, and the Newport Mining Company were both corporations organized under the laws of Maine but doing business in the State of Wisconsin up to the time of their dissolution.

63 Thereupon the petitioner offered in evidence the sixty-day letter dated March 14, 1927, with the statement thereto attached from which the appeal to the Board of Tax Appeals was taken. The same was received in evidence and made part of the record as petitioner's Exhibit No. 6, being the same as the copy of sixty-day letter and statement annexed, attached to the petition on appeal.

Thereupon, there was received in evidence as Exhibit No. 7, a copy of a letter from the Bureau of Internal Revenue dated May 6, 1927, with statements attached containing supplemental information as to the Bureau audit from which the deficiency was determined, which is the basis of the liability asserted against the petitioner, in this proceeding, under Section 280 of the Revenue Act of 1926, as a transferee of the Newport Chemical Works, Incorporated. The statement attached to said letter is as follows:

"IT:CR:G-5
SMC

"Newport Company,
Transferee of Newport Chemical Works, Incorporated.
Year ended December 31, 1917.

Statement.

Schedule 1.

Net Income.

Net income as disclosed by Bureau letter dated December 14, 1925	$465,164.05

Schedule 2.

Invested Capital.

Invested capital as disclosed by Bureau letter dated December 14, 1925:	
Newport Mining Company (includes Dunn Iron Mining Company)	$16,239,572.91
Newport Chemical Works, Incorporated	541,516.02
Northwestern Iron Company	3,684,078.15
Total	$20,465,167.08
Consolidated invested capital as corrected	18,359,255.61
Net deductions	$2,105,911.47

Additions:		
(a) Paid-in surplus	$472,349.54	
(b) Inadmissibles	239,730.81	
Total additions		$712,080.35
(c) Capital stock of subsidiary companies owned by parent: Northwestern Company	$2,480,200.00	
64 Capital stock of subsidiary companies owned by parent: Newport Chemical Works	300,000.00	
(d) Capital stock sales	37,500.00	
(e) Reserve for taxes	291.82	
Total deductions		2,817,991.82
Net deductions as above		$2,105,911.47

Explanation of Changes.

(a) This adjustment is made in conformity with agreement reached in conference with the Bureau.

(b) Since your indebtedness exceeds the inadmissible assets, no adjustment for inadmissible assets is necessary for the year 1917.

(c) This adjustment represents the stock held by the parent corporation in the subsidiary companies.

(d) As the Newport Chemical Works is held to have been affiliated with the Newport Mining Company, the sale of capital stock during the year 1917 to the Newport Mining Company has no effect upon the consolidated invested capital.

(e) Only the amounts reserved for Federal income taxes are surplus reserves for invested capital purposes. Therefore, the amount reserved for other taxes has not been included in invested capital.

Schedule 3.

Computation of Excess Profits Tax.

Consolidated invested capital		$18,359,255.61
Consolidated net income for excess profits tax purposes		2,318,749.57
Deduction 7%,	Income	Tax
$1,285,147.89 plus $3,000.00	$1,288,147.89	
Taxable at 20%	1,030,601.68	$206,120.34
Total	$2,318,749.57	$206,120.34

Allocation of Excess Profits Tax.

Consolidated net income	$2,651,999.74	
Newport Chemical Works 17.56%		$36,194.74

Computation of Totax Tax.

Net income	$465,164.05	
Deduct:		
Excess-profits tax	36,194.74	
Taxable at 2%	$428,969.31	8,579.39
Taxable at 4%	428,969.31	17,158.77
Total tax		$61,932.90
Previously assessed		18,405.65
Additional tax to be assessed		$43,527.25

"

TESTIMONY OF J. E. KUPPERIAN.

JAMES E. KUPPERIAN, being first called as a witness for the petitioner, testified as follows:

I am now vice-president, auditor, and secretary of the Newport Company. I had to do with the tax matters of the Newport Company, the Newport Chemical Works
65 and other companies that were formerly affiliated with the Newport Company or the Newport Mining Company. When the sixty-day letter addressed to the Newport Company as transferee of the assets of the Newport Chemical Works, Inc., for the year 1917, was received, there was not sufficient information given to show how the tax was determined, so I went to Washington and saw one of the men in the Income Tax Unit and was told that schedules were being made up and they would send them; I got the letter (petitioner's Exhibit 7) in response to that in the ordinary course of mail. It came to me immediately after it came through the mailing department of the company. Thereupon the petitioner rested and the respondent to maintain the issues on his part offered the following evidence which was received and made a part of the record in the case:

JAMES E. KUPPERIAN, a witness previously sworn on behalf of the petitioner, was recalled by the respondent and testified as follows:

I was not connected with The Newport Company at the time the Newport Chemical Works, Incorporated, the Newport Mining Company, and other companies were merged with it in 1919. I have been connected with The Newport Company since the middle of August, 1920.

I originally came with said company as an accountant. Sometime in 1921 I was made Assistant Controller and continued as such until about May, 1922, when I was made auditor. I continued as auditor from then until about the middle of 1927, when I became vice-president, auditor and secretary. Since about March, 1921, I have been familiar with its tax matters. I had never been connected with the Newport Chemical Works, Incorporated.

J. E. KUPPERIAN further testified:

66 That the last minute book of the Newport Chemical Works, Incorporated, then produced upon request of counsel, showed that at the last stockholder's meeting held February 12, 1919, at which the Board of Directors was elected, the following persons were elected as directors of said company, to-wit:

Ferdinand Schlesinger, H. J. Schlesinger, A. A. Schlesinger, E. G. Wilmer, H. H. Springford, J. W. Shaeffer, M. T. MacLaren.

That at the last meeting of directors held at Milwaukee, Wisconsin, February 30, 1919, the following were elected as officers for the Newport Chemical Works, Incorporated:

Ferdinand Schlesinger, Chairman of the Board of Directors, A. A. Schlesinger, President, H. J. Schlesinger, Vice President, M. T. MacLaren, Vice President, E. G. Wilmer, Vice President, J. W. Shaeffer, Vice President in charge of operations, H. J. Schlesinger, Treasurer, H. H. Springford, Secretary, Wilmot Saeger, Assistant Secretary, H. H. Springford, Auditor C. H. Brook, Assistant Auditor, Elbin H. Hillheffer, Vice President in charge of sales.

Thereupon, said witness, on the request of counsel for the respondent, produced the minute book of The Newport Com-

pany, and, upon examination thereof, testified that the first Board of Directors elected for said corporation on July 15, 1919, consisted of the following:

Ferdinand Schlesinger, Chairman, Henry J. Schlesinger (identical with H. J. Schlesinger), Armin A. Schlesinger, (identical with A. A. Schlesinger), Myron T. MacLaren, and Edward G. Wilmer.

TESTIMONY OF A. A. SCHLESINGER.

A. A. SCHLESINGER, first called as witness for the respondent, in addition to identification of the signatures to certain documents, testified as follows:

I was connected with the Newport Chemical Works, Inc., in the capacity of president. I don't recall as to the inclusive dates when I was president of the company. I should say that the company was organized about 1917. I was connected with it from its organization. I probably was president or vice president of the company in 1917 and continued to hold one or the other of these offices until the company was dissolved. I was also a director of the company during all that time. Edward G. Wilmer was one of the executive
67 officers of the company. I believe vice president. H. J. Schlesinger was an executive officer of some kind of the Newport Chemical Works, Inc. I believe he was vice president but don't know exactly. He was an officer of the Newport Company after the merger in 1919. I believe he left—he resigned his office with the Newport Company in the Spring of 1922. After that he was not a director of the company and was not a stockholder, to my knowledge. In fact, at that time he sold his entire stock interest, after he resigned.

The said witness further testified as follows: (Questions and answers set out in verbatim at the request of counsel for respondent):

(*Questions by Mr. Johnston.*)

Question: "At the time that the tax matters of the Newport Chemical Works, Inc., for the year 1917 were under consideration by the Department, state whether or not Mr. Fawsett appeared as attorney employed by the Newport Company to represent the Newport Company in reference to the appeals and protests which were pending before the Bureau?"

Answer: "Mr. Fawsett was counsel for the Newport Chemical Works. He also was counsel for the Newport Company after the Newport Chemical Works was dissolved.

Question: "Well, if the Newport Chemical Works was dissolved in 1920, afterwards then he was counsel for The Newport Company.

Answer: "Right."

Question: "At the time the appeal of 1923 was filed, he was counsel for The Newport Company."

Answer: "That is correct."

Question: "And that was the case with reference to all the subsequent protests filed with the Bureau?"

Answer: "Mr. Fawsett was counsel for the company during that entire time. What he was consulted upon in this particular work I am not competent to tell you, because I did not follow that.

68 Question: "He was given, was he not, power of attorney from The Newport Company as a successor in interest to the Newport Chemical Works and Newport Mining Company?"

Answer: "I don't know, but if he appeared in Washington, I imagine he must have had some power of attorney from The Newport Company, otherwise, he could not function.

By the Member: "You are referring to Mr. Charles Fawsett who is appearing here?"

Answer: "Yes sir; absolutely. In other words, I was not responsible for giving him a power of attorney, as far as I can recollect, but he must have had one to appear, if he did appear."

Question (By Mr. Johnston): "After the dissolution of the Newport Chemical Works, Inc., The Newport Company was the only person which had any material interest in the determination of these tax matters, was it not?"

69 Answer: "Are you asking me, or are you telling me?"

Question: "I am asking you."

Mr. Fawsett: "What is the question, I did not catch it? Will you read it please Mr. Reporter? (The reporter thereupon read the pending question as above recorded to which the record shows no answer by the witness, and the testimony proceeded as follows):

Question: "Well, the Newport Chemical Works, Inc., had no assets, no stockholders, and no means by which it could either pay a tax or be held liable for a tax; is that correct?"

The record shows no answer by the witness.

Mr. Fawcett: "We have conceded that the Newport Chemical Works, Inc., transferred all of its assets to The Newport Company, and it thereafter had no assets.

Upon cross-examination by counsel for the petitioner, said witness, A. A. SCHLESINGER, testified as follows:

H. J. Schlesinger sold out his entire interest in the Newport Company in the Spring of 1922 and shortly thereafter, as I remember, he retired. He was at no time thereafter an officer or director of the Newport Company. He had no connection with the Newport Company after that time.

70 (*Questions by Mr. Fawsett.*)

Question: "Considerable reference has been made to me as counsel for these companies during the period 1920 when these companies were dissolved and prior thereto. Did the company have another attorney besides myself?"

Answer: "The company had Mr. E. G. Wilmer."

Mr. Johnston: "Objected to as irrelevant and immaterial."

The Member: "The objection is overruled."

Answer: "The company had Mr. E. G. Wilmer, one of the vice presidents, who was a lawyer, and who had charge of all legal work besides a great deal of the executive responsibilities."

Question: "What was the nature of my employment with the company as counsel, what sort of matters were referred to me?"

Answer: "My understanding of what was referred was matters that Mr. Wilmer could not decide for himself; in other words, when he wanted a corroboratory opinion from you."

Question: "So far as you know, did I have anything to do with the dissolution proceedings of these companies?"

Answer: "I know very little about them. As far as I know, you did not, but my recollection is very vague on that subject."

Question: "But it is correct, is it not, that in my capacity and in my relationship as company's counsel that I only passed upon or gave legal advice or legal opinions on matters that were specially referred to me?"

Answer: "That is correct." (Tr. 124, 126).

Said witness was then excused but was thereafter recalled as witness for the respondent, and further testified as follows:

(*Questions by Mr. Johnston.*)

Question: "Mr. Schlesinger, during the year 1917 to the year 1919, inclusive, when the Newport Chemical Works, Inc., was merged with the Newport Company, what office did you hold with the Newport Chemical Works, Inc.?"

71 Answer: "I believe I was vice president."

Question: "At that time, where did you maintain your office as vice president?"

Answer: "I was in Milwaukee."

Question: "Did the other officers of the company maintain their offices at the same place during that time?"

Answer: "The books—the general books of the company, I believe were kept in Milwaukee; yes."

Question: "What kind of business was the Newport Chemical Works, Inc., engaged in?"

Answer: "They were engaged in the manufacture of dye stuffs and intermediates for dye stuffs."

Question: "Where was the manufacturing plant located?"

Answer: "Their manufacturing plant was located at Carrollville, Wisconsin, near Milwaukee."

Question: "Was that manufacturing plant taken over by the Newport Company when the merger was made in 1919."

Answer: "Yes."

Question: "State approximately the value of the plant?"

Mr. Fawsett, counsel for petitioner: "That is objected to as irrelevant and immaterial. We have conceded the value of the transferred assets."

After further colloquy between counsel:

Mr. Fawsett, counsel for petitioner: "We admit that they had assets in Wisconsin."

Mr. Johnston: "Sufficient—"

Mr. Fawsett: "Sufficient to cover—"

Mr. Johnston: "And up to this time those assets are still in Wisconsin and owned by The Newport Company?"

Mr. Fawsett: "Yes; we admit that the assets were transferred to The Newport Company by the Newport Chemical Works, Inc., and still held by it, and that a very substantial part of these assets are in the State of Wisconsin."

72 The Member: "It seems to me that there was an ad-

mission early in the trial to the effect that the value of these assets above the liabilities at the time of the transfer, was adequate to satisfy the liability for the tax."

Mr. Fawsett: "Yes, sir."

Said witness, A. A. SCHLESINGER, further testified as follows:

(Questions and answers are set out in verbatim at the request of counsel):

(*By Mr. Johnston.*)

Question: "After the merger of the Newport Chemical Works with The Newport Company, who received the mail of the Newport Chemical Works, Inc., of Maine?"

Answer: "I don't know. I imagine that the mail was addressed to the same address as it had been previously addressed to."

Question: "Well, is it not a fact that it was received at the office of the Newport Company?"

Answer: "I think that is very likely, although I don't know."

Question: "As far as you know, there was no mail received at any other place?"

Answer: "I don't know where the mail was received. I say, I assume that it was received in Milwaukee, at the same address."

Question: "Who now receives any mail addressed to the Newport Chemical Works, Inc., of Maine, with reference to tax matters?"

Answer: "I don't know."

Question: "Is it not a fact that The Newport Company has been receiving that mail all along at the office of The Newport Company?"

Answer: "Well, it is possible, but I can't say. I never received any."

Question: "You don't know of anybody else having received it?"

Answer: "I don't know of any."

Thereupon, JAMES E. KUPPERIAN was recalled as witness for the respondent and further testified, in verbatim, as follows:

(*Questions by Mr. Johnston.*)

Question: "Mr. Kupperian, how long have you been secretary of the Newport Company?"

78 Answer: "Since, I think, late in the Spring of 1927."

Question: "Since that time has the Newport Company received any mail addressed to the Newport Chemical Works, Inc., of Maine?"

Answer: "I can't recall that. I don't think so."

Question: "If any mail was addressed to the Newport Chemical Works, Inc., of Maine, at Milwaukee, Wisconsin, whom would that mail be received by?"

Mr. Fawsett, counsel for petitioner: "In the interest of saving time, I would like to admit, if Mr. Johnston will accept it, that any mail that might be addressed to the Newport Chemical Works, Inc., probably would go to the office of the Newport Company there, and if it did come there, that it would be taken in by the Newport Company as the successor in interest of the Newport Chemical Works, Inc."

The Member: "It seems to me that that would follow as a matter of course. The address was the same, was it not, Mr. Fawsett?"

Mr. Fawsett: "Yes, I think the address was the same: that is, to this extent: In 1917, 1918, 1920, and for several years afterwards all of these companies used common administrative offices, occupying one or two floors of a large office building and there is not any doubt that they had the same mail distributing clerk, and whatever mail was addressed there came to those same officers within the last five or six years, and since the Newport Chemical Works, Inc., was dissolved. The Newport Company, one of the companies that formerly occupied those offices, gave them up, and the office of the Newport Company is now at Carrollville, Wisconsin, but I have not any doubt, on account of the similarity of names, there are deliveries of mail that would come to the Newport Chemical Works, Inc., which would ultimately get to the Newport Company, and the Newport Company, when it came to it, would take it in and treat it as mail in which it was interested because it is the successor in interest to the Newport Chemical Works, Inc."

Mr. Johnston to Mr. Fawsett: "Will you add to that, so far as you know, there is no other person or corporation authorized to receive mail addressed to the Newport Chemical Works, Inc., of Maine?"

74 Mr. Fawsett: "Not so far as I know. I should be very much surprised if there were. I do not profess to know anything about it. I am only stating the obvious, what seems to me to be entirely obvious from the facts that I know. The Newport Company is the successor in interest to the Newport Chemical Works, Inc."

There was received in evidence without objection, a power of attorney from The Newport Company and The Youngstown Sheet and Tube Company, copy of which follows:

EXHIBIT B.

"Know All Men By These Presents that the Newport Company a corporation organized and existing under the laws of Delaware, and Youngstown Sheet & Tube Company, a corporation organized and existing under the laws of Ohio, do hereby constitute and appoint Charles F. Fawsett and J. E. Kupperian of Milwaukee, Wisconsin, and F. F. Byerly of Chicago, Illinois, and each of them their true and lawful attorneys with full power and authority to appear for and represent them and the Newport Mining Company which was dissolved in the year 1920, but which prior to that time was a corporation organized under the laws of Maine, or any of the subsidiaries of said the Newport Mining Company, including the Northwestern Iron Company, the Harrow Spring Company and the Newport Chemical Works, Inc., severally and separately, or jointly or together, in all matters involving claims for additional assessment of income or profits taxes against the Newport Mining Company or any of its subsidiaries on the part of the United States of America for the years 1916, 1917, 1918 and 1919, or involving claims for refund by said companies or any of them on account of over assessments or collections of taxes heretofore made, or in connection with any matters arising out of the income and profits tax returns of said companies, or any of them for said years, and particularly in connection with all matters referred to in the letter of the Commissioner of Internal Revenue to said companies under date of December 3, 1924, initialed IT:CR:G-OM-5, and at any and all conferences or hearings before the income tax unti or any department of the office of the commissioner of internal revenue, or of any

branch of the treasury department of the United States which may be arranged for, allowed or had in relation to any of said matters affecting any of said companies.

"This authorization and power of attorney shall take the place of the power of attorney heretofore granted to Charles F. Fawsett, J. E. Kupperian and Charles H. Brook, dated the 5th day of September, 1923.

"In Witness Whereof said the Newport Company and the Youngstown Sheet & Tube Company as successors in interest of the said Newport Mining Company and its subsidiaries have respectively caused these presents to be duly executed by their proper officers, attested by their respective secretaries under their respective corporate seals this 30th day of January, 1925."

"THE NEWPORT COMPANY,
By: W. F. LIEBNER,
Vice-President.

Attest:
C. W. WESTERMAN,
Secretary.

"In presence of:
E. PORT,
S. FERKUSON,
As to the Newport Company.

THE YOUNGSTOWN SHEET & TUBE COMPANY,
By: FRANK PURNELL,
Vice President.

Attest:
W. OMERT,
Secretary.

In presence of:
CATHERINE M. GRIFFIN,
L. B. ARNOLD,
As to Youngstown Sheet & Tube Co.

75 There was received as evidence for the Commissioner the following statement incorporated in the Affiliated Corporation's Questionnaire of The Newport Company for the year 1919, identified as Petitioner's Exhibit No. 16, excerpts from which had been received as evidence for petitioner after proof of execution and filing by the authorized officers of The Newport Company:

EXHIBIT 16.

"As will be seen from detailed information set out above, each and all the aforesaid corporations is controlled or owned directly or indirectly by the same interests, to-wit, the following individuals:

"Ferdinand Schlesinger, Milwaukee, Wis.
Mathilda Schlesinger, his wife, Milwaukee, Wis.
Armin A. Schlesinger, his son, Milwaukee, Wis.
Henry J. Schlesinger, his son, Milwaukee, Wis.
Gertrude MacLaren, his daughter, Milwaukee, Wis.

"All of said companies with exceptions of Companies 3 & *4 maintain their principal business offices on the 10th and 11th floors of the First Wisconsin National Bank Bldg., Milwaukee, and the operations of them are in fact handled as a single business enterprise. The Schlesingers personally direct the central organization conducting the business in all of its activities. Intercompany relations correspond substantially to those existing between branches of the same establishment. These inter-company relations result in numerous inter-company transactions, and a consolidated return for the entire group is essential to an equitable assessment of the tax.

"The Central Organization controlling and directing all the companies, as shown in greater detail hereafter, and operating through a Chief Staff, a General Auditor, a General Purchasing Agent, a General Sales Agent, a General Insurance Officer, and General Legal Counsel, serves all companies in the capacities relating not only to each department of the business, but in relation also to the business as a whole. The fact is, that the companies are one business enterprise conducted through the constituent units.

"The group of corporations covered by this questionnaire is the outgrowth of a continuous development which had its origin in the acquisition by Ferdinand Schlesinger of the Dunn Iron Mining Company. Mr. Schlesinger's activities soon included The Newport Mining Company, which while first engaged purely in the operation of iron mining properties, subsequently extended to a number of allied activities.

"After a period of expansion in the activities of The Newport Mining Company the various phases of that business which, however, always remained closely associated as one

* Companies 1, 2, 3, 4 and 5 are shown on that portion of Exhibit No. 16 appearing on page 48 hereof.

large enterprise were centered in individual corporations for the more efficient administration and operation.

"In July, 1919 there was a general reorganization of these various Corporations resulting in the companies as shown above at the end of the taxable year; but the ownership and control of the reorganized companies continued substantially as before.

"The facts are that each of said corporations is a component part of a group, all of whose parts are closely interrelated, the entire group representing broadly a single self contained industry in the Chemical field.

76 "There are many forms of inter-company co-operation natural to a control by the same interests. Inter-Company financial accommodations, frequent collaborations by engineers, mechanics and scientists at the different plants, the actual sharing in the services of important employes and a more or less arbitrary apportionment of over head expense common to all the enterprises are illustrative."

Jurat.

"We, the undersigned, general officers of The Newport Company being severally duly sworn, each for himself deposes and says that the answers to the questions herein, including statements and figures entered in the accompanying tables and in any additional tables, statements, and schedules attached hereto, are, to his best knowledge and belief, true and correct in each and every particular.

"A. A. SCHLESINGER,
President.

"N. J. SCHLESINGER,
Vice President & Treasurer.

"Sworn to and subscribed before me this 14th day of April, 1920.

"C. W. WESTERMAN,
(Seal) *Notary Public, Milwaukee County, Wisconsin.*

My Commission expires 10-28-21."

Upon the admission of counsel for petitioner of the genuineness of all signatures thereto, there was received in evidence as RESPONDENT'S EXHIBIT "C", a document entitled "Appeal of The Newport Mining Company To The Commissioner from Additional Assessment for 1917". The portions of this document now pointed out by the Commissioner as material to this proceeding, are as follows:

"Stamped: Received Oct. 16, 1923, Natural Resources Audit Division.

"Commissioner of Internal Revenue,
Washington, D. C.

Sir:

"Appeal is hereby taken from the findings of the Income Tax Unit regarding the Corporation Income and Excess Profits Tax Return of our Company, The Newport Mining Company, and affiliated Companies, for the taxable year 1917 and prior years, as set forth in the registered letter dated August 13th, 1923.

"This appeal is filed pursuant to the provisions of T. D. 3492 as modified by the extension of time to October 15th, 1923, granted in this case by the Treasury Department in a letter of September 17th, 1923.

"The following information required in accordance with T. D. 3492 is submitted as a matter of record:

77 "(a) Name of Taxpayers and

"(b) Address	State in which Incorporated
Newport Mining Co. P. O. Box 1582 Milwaukee, Wis.	Maine
Dunn Iron Mining Co. Youngstown, Ohio	Wisconsin
Northwestern Iron Co. Youngstown, Ohio	Wisconsin
Northwestern Milling Co. Youngstown, Ohio	Wisconsin
N. W. Light & Power Co. Youngstown, Ohio	Wisconsin
N. W. Lime, Stone & Slag Co. Youngstown, Ohio	Wisconsin
Harrow Spring Co. Youngstown, Ohio	Michigan
Newport Turp. & Rosin Co. of Fla. P. O. Box 1582 Milwaukee, Wis.	Florida
Newport Chem. Works, Inc. Milwaukee, Wis. P. O. Box 1582	Maine
Newport Turp. & Rosin Co., Ala. P. O. Box 1582 Milwaukee, Wis.	Alabama
Harvest Farms Co. Youngstown, Ohio	Wisconsin
Gogebic Steel Co. P. O. Box 1582 Milwaukee, Wis.	Indiana.

"(c) Treasury Department's registered letter dated August 13th, 1923—symbols IT:NR:G—EFS—5.

"(d) Year 1917—The amounts of additional tax proposed by the Treasury Department's letter above referred to for 1917 are as follows:

"Newport Mining Co.	$187,966.47
Dunn Iron Mining Co.	116,643.10
Northwestern Iron Co.	164,066.64
Northwestern Milling Co.	282.94
Northwestern Light & Power Co.	634.89
Harrow Spring Co.	12,313.21
Newport Turpentine & Rosin Co. of Fla.	5,975.56
Newport Chemical Works, Inc.	116,065.49

"(e) The extent to which these several amounts are excepted to will be indicated in connection with the exceptions which follow.

"(f) An oral conference will be desired in Washington between representatives of this Company and of the Treasury Department.

"(g) This appeal is not filed for the purpose of delay, but with the object of arriving at an equitable adjustment of the amount of tax.

Exceptions to Findings, Etc.

"(e) Newport Chemical Works, Inc.

"Reference is made to Schedules 36, 37 and 47 of the Department's letter of August 13, 1923.

"In connection with this plant the Department has adopted a composite rate of 12% both for the year 1916 and 1917. It is to be noted that this arbitrary adjustment to a uniform rate for the two years is not warranted by the facts for the reason that production did not commence at all until July, 1916, and the plant did not reach a normal point of operation and production until the end of January, 1917.

Conclusion.

"In conclusion we recognize the difficulties of some of the questions involved in the foregoing exceptions, and, to facilitate their proper determination, we beg to repeat our request for the privilege of an oral conference with the assurance of our earnest cooperation.

78 "This appeal is taken by the Newport Mining Company for and on behalf of each of the subsidiary and affiliated companies named in said letter of the Department of August 13th, 1923, as well as on its own behalf, and it is duly authorized to take such appeal.

"Respectfully submitted,

THE NEWPORT MINING COMPANY,
By CHARLES F. FAWSETT,
General Counsel."

"State of Wisconsin }
Milwaukee County } ss.

"H. H. SPRINGFORD, being first duly sworn, says that on or about the 31st day of July, 1919, all of the assets of the above named The Newport Mining Company were transferred to and divided between The Steel & Tube Company of America and The Newport Company, and likewise all of its outstanding and issued capital stock was transferred to and divided between said companies by way of consolidation and that thereafter in due course, in the early part of the year 1920 said The Newport Mining Company was dissolved; that at the time of said transfer of assets and consolidation and at the time of the dissolution of said The Newport Mining Company, he was one of the general officers, to wit, the secretary of said Company, in charge of its auditing department and of all of its books, records, and accounts, including also the affiliated or subsidiary companies referred to in the letter of the Department of August 13, 1923, described in said appeal, and that he had been so in charge of the auditing department of said Company and of its books and accounts for more than ten years prior to the time of its dissolution aforesaid, and that during all of said time he was familiar with the business and affairs of said companies in all of their departments.

"That he is now the vice-president of said The Newport Company, and has been connected with said Company and familiar with its business and affairs since the time of its organization; that he is now the president of The Steel & Tube Company of America and has been connected with said Company and familiar with its business and affairs since the time of the consolidation of the assets of said The Newport Mining Company with said other two companies and that he makes this verification in his capacity as secretary of said The Newport Mining Company at the time of its dissolution and prior thereto, and as vice-president of said The Newport Company and as president of the Steel & Tube Company of America which became the owners of all of the property and capital stock of said The Newport Mining Company at the time of said consolidation as aforesaid, and that he is duly authorized so to do.

"That he has read the above and foregoing appeal and is familiar with the matters therein referred to, and that all of the statements of fact contained in said appeal are true to

the best of the knowledge, information and belief of this affiant and that all of the claims made by said The Newport Mining Company in said appeal, either for itself or for any of the subsidiary or affiliated companies named therein and referred to in said letter of the Department of August 13, 1923, to the best of the knowledge, information and belief of this affiant are in accordance with the facts and in all respects true and correct.

"H. H. SPRINGFORD.

"Subscribed and sworn to before me this 13th day of October, 1923.

EDMOND B. THEE,
Notary Public, Milwaukee, Wis."

79 The respondent offered in evidence a carbon copy of a document, which was received as RESPONDENT'S EXHIBIT "D"; the portions thereof now pointed out by the respondent as material are as follows:

"EFS-5
IT:NR:G
(Stamped) "August 7, 1923 Listed for registration"
"Newport Mining Company,
1112 First National Bank,
Milwaukee, Wisconsin.
"Sirs:

"An examination of your income tax returns and those of your affiliated company (or companies) together with the information heretofore submitted has been made and the results thereof are outlined in the attached schedules.

"In accordance with the provisions of Section 250(d) of the Revenue Act of 1921, you are granted thirty days within which to file an appeal and show cause or reason why this tax or deficiency should not be paid. No particular form of appeal is required, but if filed it must set forth specifically the exceptions upon which it is taken, shall be under oath, contain a statement that it is not for the purpose of delay, and the facts and evidence upon which you rely must be fully stated. The appeal, if filed, must be addressed to the Commissioner of Internal Revenue, Washington, D. C., for the specific attention of IT:NR:G-EFS, and will be referred to the Income Tax Unit before transmittal to the agency designated for the hearing of such appeals.

"You may, if you desire, request a conference before the Income Tax Unit in connection with the appeal, to be held within the period prior to the expiration of five days after the time prescribed for the filing of the appeal. If the In-

come Tax Unit is unable to concede the points raised in your appeal, it will be transmitted, together with the recommendation of the Income Tax Unit, to such agency as the Commissioner may designate for final consideration.

"Where a taxpayer has been given an opportunity to appeal and has not done so, as set forth above, and an assessment has been made, or where a taxpayer has appealed and an assessment in accordance with the final decision on such appeal has been made, no claim in abatement of the assessment will be entertained.

"Payment should not be made until a bill is received from the Collector of Internal Revenue for your district, and remittance should then be made to him.

"Respectfully,
(Signed) J. G. BRIGHT,
Deputy Commissioner.

"Enclosures:
Schedules 1 to 62 inclusive."

* * * * * * *

80 "Schedule 47

"Net Income Year ended December 31, 1917.
"Newport Chemical Works, Incorporated

Net income as disclosed by return		$104,785.00
As corrected		483,309.60
Net additions		$378,523.70
"Additions:		
(a) Depreciation	$354,963.35	
(b) Sundry reserves	7,708.63	
(c) Organization expense	15,891.72	
Total additions		$378,563.70
"Deduction:		
(d) Federal income tax reserved		40.00
Net additions as above		$378,523.70"

The above is followed by a detailed explanation of items changed.

* * * * * * *

"Schedule 51

"Consolidated Net Income (1917)		
Net income as corrected:		
Newport Mining Company, Schedule 40	2,080,239.93	
Dunn Iron Mining Co., Schedule 41	602,253.04	
Northwestern Iron Co., Schedule 42	741,024.91	
Northwestern Milling Co., Schedule 43	4,968.01	
Northwestern Light & Power Co., Schedule 44	3,115.78	
Harrow Spring Co., Schedule 45	57,031.64	
Newport Turpentine & Rosin Co. of Fla., Sch. 46	30,500.47	
Newport Chemical Works, Inc., Schedule 47	483,309.60	
Total		$4,002,443.38
Net losses as corrected:		
Northwestern Lime, Stone & Chemical Co. Sch. 48	$ 384.53	
Harvest Farms Co., Schedule 49	10,240.98	
Newport Turpentine & Rosin Co. of Ala., Sch. 50	1,444.76	
Total		12,070.27
Aggregate net income		3,990,373.11
Deduct:		
Dividends, Newport Mining Co.	308,375.00	
Dividends, Northwestern Iron Co.	3,175.23	
Intercompany interest (see Schedule 41, $13,803.86 plus $11,071.31)	24,875.17	
Intercompany profit in inventories (See computations below)	30,063.86	
Total		366,489.26
Consolidated net income for excess profits tax purposes		$3,623,883.85
Intercompany profit in inventories.		$ 30,063.86

The above is followed by detailed statements in explanation of the various items.

* * * * * *

81 "Schedule 52

"Consolidated invested capital for 1917

"Inasmuch as no consolidated return was filed, invested capital for 1917 is determined on the basis of data reflected by your books of account and records as set forth in the balance sheets dated January 1, 1917, together with adjustments made thereto by this office:

"Capital stock		$ 2,221,300.00
Earned surplus		7,779,200.72
Paid-in surplus		3,001,790.84
Surplus reserves		364,262.03
Total		$13,366,553.59
Less:		
Federal income tax liabilities accrued Dec. 31, 1916	$ 68,950.85	
Accrued expense, Dec. 31, 1916 not entered in books	35,169.75	
Appreciation	745,504.80	
Insufficient provision for depreciation to Dec. 31, 1916	699,372.59	1,548,997.99
Consolidated invested capital		$11,817,555.60

The above items are calculated as follows:

"Capital stock:	
"Stock outstanding Dec. 31 ,1916:	
Newport Mining Company	$1,395,500.00
Dunn Iron Mining Company	25,000.00
Northwestern Iron Company	3,000,000.00
Northwestern Milling Company	5,000.00
Northwestern Light & Power Co.	35,000.00
Harrow Spring Company	300,000.00
Newport Turpentine & Rosin Co. of Florida	100,000.00
Newport Chemical Works, Incorporated	300,000.00
Northwestern Lime, Stone & Slag Company	5,000.00
Harvest Farms Company	71,700.00
Gogebic Steel Company	75,000.00
Newport Turpentine & Rosin Company of Alabama	100,000.00
Total	$5,412,200.00

82 "Less: Intercompany holdings:
"Newport Mining Company:

"Dunn Iron Mining Company	25,000.00	
Northwestern Iron Company	2,480,200.00	
Newport Turpentine & Rosin Company of Florida	100,000.00	
Newport Chemical Works, Inc.	300,000.00	
Harvest Farms Company	65,700.00	
Gogebic Steel Company	75,000.00	
Newport Turpentine & Rosin Company of Alabama	100,000.00	
By Northwestern Iron Company:		
Northwestern Milling Company	5,000.00	
Northwestern Light & Power Co.	35,000.00	
Northwestern Lime, Stone and Slag Company	5,000.00	3,190,900.00
		$2,221,300.00

"Earned Surplus:

"Newport Mining Company	6,560,032.39
Dunn Iron Mining Company	339,446.66
Northwestern Iron Company	644,720.86
Northwestern Milling Company	2,250.51
Northwestern Light & Power Company	1,117.82
Newport Turpentine & Rosin Co. of Florida	7,596.09
Newport Chemical Works, Incorporated	203,822.87
Newport Turpentine and Rosin Company of Ala.	99,082.99
Total	$7,858,070.19

"Less Deficits:

Narrow Spring Company	42,885.26	
Northwestern Lime, Stone & Slag Company	190.87	
Harvest Farms Company	35,793.34	78,869.47
Net consolidated surplus		$7,779,200.72

"Paid-in Surplus"

"The paid-in surplus of $3,001,780.84 is determined as follows:

Newport and Bonnie Mines	$4,975,461.80
Anvil Mine	.....
Keweenaw Mine	110,819.06
Palms Mine	1,716,895.43
Mayville Mine	.....
"Total value of losses	6,803,176.29

"Less:

Depletion sustained and amortization of cost of leases to Jan. 1, 1917	$2,261,437.92	
Values on books—Jan. 1, 1917:		
Newport & Bonnie, title account.	350,000.00	
Anvil, title account	15,000.00	
Keweenaw	0.00	
Palms:		
Tital account	100,000.00	
Exploration account	391,378.49	
Development account	147,482.45	
Mayville, mine ore lands	536,086.58	3,801,385.45
Paid-in surplus		$3,001,790.84

* * * * * *

83 "Schedule 53

"Computation of Excess Profits Tax

Consolidated invested capital (Schedule 52)		$11,817,555.60
Consolidated net income (Schedule 51)		$ 3,623,883.85
	Income	Tax
Deduction 7%, $827,228.89 plus $3,000	$ 830,228.89	
Taxable at 20%	942,404.45	$188,480.89
25%	590,877.78	147,719.45
35%	590,877.78	206,807.22
45%	669,494.95	301,272.73
	$3,623,883.85	844,280.29

"Allocation of Excess Profits Tax

Name of Company	Per Cent	Amount
Newport Mining Company	48.74	411,502.22
Dunn Iron Mining Company	15.88	134,071.71
Northwestern Iron Company	19.47	164,381.37
Northwestern Milling Company	0.13	1,097.56
Northwestern Light & Power Company	0.08	675.42
Narrow Spring Company	1.57	13,255.20
Newport Turpentine & Rosin Co. of Fla.	0.84	7,091.96
Newport Chemical Works, Inc.	13.29	112,204.85
	100.00	$844,280.29

* * * * * *

"Schedule 61

"Computation of Total Tax (1917)

Newport Chemical Works, Incorporated		Tax
Net income (Schedule 47)	$483,309.60	
Deduct: Excess profits tax (Schedule 53)	112,204.85	
Taxable at 2%	$371,104.75	7,422.10
Taxable at 4%	371,104.75	14,844.19
Excess profits tax as above		112,204.85
Total tax		$134,471.14
Previously assessed		18,405.65
Additional tax to be assessed		$116,065.49

"Schedule 62

"Summary of Changes in Tax Liabilities:

Name of Company	Schedule No.	Year	Additional Tax	Overassessment
Various		1909–1916, Incl.		$25,613.13
Newport Mining Company	54	1917	$187,966.47	
Dunn Iron Mining Company	55	1917	116,643.10	
Northwestern Iron Co.	56	1917	164,066.64	
Northwestern Milling Co.	57	1917	282.94	
Northwestern Light & Power Co.	58	1917	634.89	
Narrow Spring Compay	59	1917	12,313.21	
Newport Turpentine & Rosin Co. of Florida	60	1917	5,975.56	
Newport Chemical Works, Inc.	61	1917	116,065.49	
			$603,948.30	$25,613.13
Net additional tax to be assessed			578,335.17	

Waivers for 1917 are on file in this office."

There was received in evidence as RESPONDENT'S EXHIBIT R the following letter:

84 "THE NEWPORT COMPANY

Milwaukee, Wis.
August 28, 1923.

"Commissioner of Internal Revenue,
Washington, D. C.

Reference IT:NR:G:EFS-5

Dear Sir:

"Referring to your letter and accompanying report of August 13, 1923, in which we are advised of an additional assessment of The Newport Mining Company and its subsidiaries to the amount of $578,335.17 and are allowed thirty

days within which to file exceptions, it is not clear to us from the report as to how the basis of the tax with respect to some of the most important items was arrived at, and it is necessary to enable us to prepare the proper exceptions to obtain some further information as to the basis of the tax.

"Will you, therefore, please advise us of the earliest date that a brief conference can be arranged for at which time our representative may obtain the additional information required. As considerable work will have to be done to properly present our exemptions and the time is limited, may we ask you to kindly answer at once by wire at our expense or by return mail.

Very truly yours,
THE NEWPORT MINING COMPANY,
By H. J. SCHLESINGER,
Vice-President."

There was received in evidence as RESPONDENT'S EXHIBIT F a letter dated December 3, 1924. The portions thereof now pointed out by the Commission with respect to the issues in this proceeding are as follows:

"December 3, 1924.

"IT:CR:G
OM-5

"Newport Chemical Works, Inc.
1112 First National Bank Building,
Milwaukee, Wisconsin.

Sirs:

"An audit of your income tax returns for the year 1917 has resulted in the tentative determination of a deficiency in tax amounting to $226,710.08. Adjustments resulting in this deficiency are outlined in the attached schedules.

"You are granted thirty days from the date of this letter within which to present a protest, supported by additional evidence or brief, against this determination of a deficiency. Upon request submitted within the period mentioned, you will also be granted a hearing in the Bureau with reference to the matter. A request for a hearing should contain (a) the name and address of the taxpayer; (b) in the case of a corporation, the name of the State of incorporation; (c) a designation by date and symbol of the notice or notices with respect to which the hearing is desired; (d) a designation of the year or years involved and a statement of the amount of tax in dispute for each year; (e) an itemized schedule of the findings of the Unit to which the taxpayer takes exception;

and (f) a summary statement of the grounds upon which the taxpayer relies in connection with each exception.

"If, after consideration of any additional evidence submitted and any arguments advanced by you, a deficiency is finally determined by the Bureau to be due from you, you will, in accordance with the provisions of Section 274 of the Revenue Act of 1924, be advised by registered mail of the final determination of the Commissioner as to the amount of the deficiency, and allowed 60 days from the mailing of the letter in which to file an appeal to the Board of Tax Appeals in the event you do not acquiesce in such final determination.

85 "If you acquiesce in the determination of a deficiency as disclosed in this letter and the accompanying statements, you are requested to sign the enclosed agreement consenting to the assessment of such deficiency, and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:CR:G:OM-5. In the event that you acquiesce in a part of the determination, the agreement should be executed with respect to the items agreed to.

"Respectfully,
(Signed) J. C. BRIGHT,
Deputy Commissioner.

Enclosures:
Statements,
Agreement—Form A,
Schedules 1 to 7 inclusive."

"IT:CR:G
OM-5

"STATEMENT OF RETURNS EXAMINED AND RESULTING TAX LIABILITY.

Returns Examined

Company	Year	Form
Newport Chemical Works, Inc., 1112 First National Bank Bldg., Milwaukee, Wisconsin.	1916	1031
	1917	1031 & 1103

Tax Liability

Company	Year	Schedule	Additional Tax	Overassessment.
Newport Chemical Works, Inc.	1916	2		$1.98
	1917	7	$226,710.08	

"Waiver for the year 1917 filed February 26, 1924 expires April 1, 1925.

"The overassessment for the year 1916 is allowed under the provisions of Section 281 (a) of the Revenue Act of 1924.

"The overassessment will be made the subject of a certificate of overassessment which will reach you in due course through the office of the Collector of Internal Revenue for your district and will be applied by that official in accordance with the provisions of Section 281 (a) of the Revenue Act of 1924.

"In accordance with a revised ruling holding that you were for the year 1917 affiliated with no other corporation, your tax liability for that year is determined on a nonconsolidated basis."

The above is followed by Schedules 1 to 7, inclusive, showing the manner in which the overassessment for the year 1916, in the amount of $1.98, and the additional tax for 1917, in the amount of $226,710.08, were arrived at.

There was received in evidence as RESPONDENT'S EXHIBIT E, a document stamped "Received Consolidated Returns Audit Division, December 31, 1924." The portions of said document now pointed out by the Commissioner as material to the questions at issue herein are as follows:

86 "IT:CR:G
OM-5

"The Newport Mining Company
and
Dunn Iron Mining Company

BEFORE THE COMMISSIONER OF INTERNAL REVENUE.

"Protest by the Newport Mining Company Against the Determination as to the Amount of Overassessment for the Years 1914 to 1917, Inclusive, and by the Dunn Iron Mining Company Against the Determination of a Deficiency in Income and Profits Taxes for the Years 1915 and 1917, and as to the Amount of Over Assessment for the Years 1914 and 1916.

"Commissioner of Internal Revenue,
Washington, D. C.

Sir:

"The Newport Mining Company for itself and for the Dunn Iron Mining Company, affiliated with it, hereby protests against the determination by the Income Tax Unit as to the amount of over assessments allowed to it, the Newport Mining Company, for the years 1914 to 1917 inclusive, and for

its subsidiary and affiliated company, the Dunn Iron Mining Company protests against the determination of a deficiency in tax for the years 1915 and 1917, and against the determination as to the amount of the overassessment allowed to it, said Dunn Iron Mining Company for the years 1914 and 1916, all as set forth in the letters of the department initialed as above under date of December 3, 1924, signed by J. G. Bright, Deputy Commissioner.

"It also protests against the determination of the Income Tax Unit that the Newport Chemical Works, Inc. was not affiliated with it, the Newport Mining Company, a subsidiary and affiliated corporation entitled to have its excess profits tax return for the year 1917 consolidated with that of the Newport Mining Company for the year 1917, as held in said letter and in the letter of the same date addressed to the Newport Chemical Works, Inc.

"The Dunn Iron Mining Company joins in these protests.

"A conference and hearing before the Income Tax Unit is requested as provided for in Article 1211 of Regulations 63, and the following information is submitted:

(a) Name of Taxpayer	Address	State in which incorporated
(b) Newport Mining Co.	Carrollville, Wis. P. O. Box 1582, Milwaukee, Wis.	Maine
Dunn Iron Mining Co.	Youngstown Sheet & Tube Co., Youngstown, Ohio	Wisconsin
Newport Chemical Works, Inc.	Carrollville, Wis., P. O. Box 1582, Milwaukee, Wis.	Maine

(c) Treasury Department's registered letters dated December 3, 1924—symbols IT:CR:G:OM-5.

87

(d) Company	Year	Additional Tax	Overassessment.
Newport Mining Co.	1914		$ 3,927.28
	1915		4,829.50
	1916		17,925.02
	1917		83,553.02
Dunn Iron Mining Co.	1914		262.10
	1915	$ 53.77	
	1916		368.83
	1917	12,911.98	
		$12,965.75	$110,865.67.

Summary of Exceptions.

"(11) The revised ruling under which the Newport Mining Company is held not to be affiliated with any other company except the Dunn Iron Mining Company.

Grounds on Which the Foregoing Exceptions Are Based.

"6. Exception (11). The taxpayers desire to except to the new ruling of the department that the Newport Mining Company during the year 1927 was not affiliated with any other company except the Dunn Iron Mining Company.

"The Newport Chemical Works, Inc. has filed a separate protest of even date herewith against the determination of the Unit that only the Dunn Iron Mining Company was affiliated with the Newport Mining Company for the year 1917 and claims in such protest that it, the Newport Chemical Works, Inc., was also affiliated with the Newport Mining Company for that year and that its tax liability should be determined on the basis of such affiliation. These taxpayers concur in such protest, and to avoid repetition, they hereby adopt all of the statements of facts and contentions made by the said Newport Chemical Works, Inc. in its said protest in support of its said claim of affiliation.

"With regard to the question of the affiliation of other subsidiaries of the Newport Mining Company for the year 1917 referred to in said letters, these taxpayers are willing to waive the question as to whether any or all of such other subsidiaries were affiliated with the Newport Mining Company for the year 1917 provided such waiver shall not be construed to in any wise prejudice the question of such affiliations for subsequent years.

"It is recognized by these taxpayers that the conditions as well as the law and regulations were materially different in the year 1918 from the year 1917, and because of the difference in the conditions the taxpayers are not at this time disposed to insist upon the consolidation of the returns of any of the other of the subsidiary companies for the year 1917 with the exception of the Newport Chemical Works, Inc., the facts in regard to which as disclosed by its protest would seem to clearly require a consolidated return under the express provisions of Section 1331 of the Act of 1921."

88 "As to all of the other subsidiaries, subject to the reservation above stated, these taxpayers are willing to accept the ruling of the Unit on the question of affiliations for the year 1917.

"Reservation of Right to Furnish Additional Data.

"As the rulings of the Unit to which the foregoing exceptions are taken were made without previous conference with the taxpayers, although the usual request for such conference was made, we are not in position to determine, what, if any, additional data may be required to substantiate our present exceptions. It is our purpose to have present at the conference herein requested the proper representatives of the companies who will be able to furnish such additional information at first hand as may be required, and in the meantime we request the privilege of filing such additional data as may be found helpful in the determination of the questions involved.

"Waivers to Be Furnished.

"The taxpayers hereby place upon record their willingness to file all required waivers to permit of the final determination of the above exceptions before the expiration of any period of limitation provided by law and will forthwith transmit such waivers to be filed in connection herewith as soon as the same can be prepared and properly executed.

"State of Wisconsin, }
"Milwaukee County. } ss.

A. A. SCHLESINGER being first duly sworn says that he was during the years 1917 and 1918 the president of the Newport Mining Company and was one of the principal executive officers of the Dunn Iron Mining Company, and as such actively participated in the management of the business and affairs of both of said companies during said years and prior thereto. That he was also vice-president and treasurer of the Newport Chemical Works, Incorporated, during said years and was then and ever since has been familiar with the business and affairs of all of said companies, and that he is familiar with the facts stated in the foregoing protests and in connection with the exceptions contained therein, and that he makes this verification for and on behalf of all of said companies and particularly on behalf of the Newport Mining Company and the Dunn Iron Mining Company and that he is duly authorized so to do. That he has read said protests and the statements made therein and in connection with the foregoing exceptions and that all of such statements are true to the best of his knowledge, information and belief.

"A. A. SCHLESINGER.

"Subscribed and sworn to before me this 27th day of December, A. D. 1924.

CHARLES E. MONROE,
Notary Public, Milwaukee Co. Wis.
My Commission expires Dec. 26, 1926."

89 There was received in evidence, without objection, upon the acknowledgment of the signature thereto by Mr. Charles F. Fawsett, attorney for the petitioner, the following letter which was marked for identification as EXHIBIT "P":

"FAWSETT, SMART & SHEA
"First Wisconsin National Bank Building,
Milwaukee,
December 26, 1924.

"IT:CR:G
OM-5
Received Consolidated Returns Audit Division Dec. 31, 1924 Asst. Head of Division.
Commissioner of Internal Revenue,
Washington, D. C.
Sir:

"Enclosed you will please find the protest of the Newport Mining Company and Dunn Iron Mining Company and of Newport Chemical Works, Inc., from certain of the determinations of the Income Tax Unit as set forth in letter of the department initialed as above addressed to the respective companies under date of December 3, 1924, and signed by J. G. Bright, Deputy Commissioner.

"We also enclose new waivers for the year 1917 for the Newport Mining Company, Newport Chemical Works, Inc., Newport Turpentine & Rosin Company of Florida, Newport Turpentine & Rosin Company, Incorporated and Gogebic Steel Company.

"The waivers for the Dunn Iron Mining Company, Harrow Spring Company, Northwestern Light & Power Company, Northwestern Lime, Stone & Slag Company, Northwestern Milling Company, Harvest Farms Company and Northwestern Iron Company will be forwarded by the Youngstown Sheet & Tube Company with the protests of the Northwestern Iron Co. and Harrow Spring Co., all of which we trust you will receive in proper order and in due season.

Respectfully yours,
CHARLES F. FAWSETT (Signed)
"General Counsel for all of said companies."

"CFF-W
"Enclos.

90 There was received in evidence as RESPONDENT'S EXHIBIT "O", a letter to the Newport Chemical Works, 1112 First National Bank Building, Milwaukee, Wisconsin, dated December 14, 1925. The portions of said letter now pointed out by the respondent as material in this proceeding are the following:

"IT:CR:G-5
KLS

"December 14, 1925.

"Newport Chemical Works,
1112 First National Bank Building,
Milwaukee, Wisconsin.

Sirs:

"An audit of the income tax returns filed by your company for the taxable years 1916 and 1917 has resulted in a tentative determination of a deficiency in tax for 1917 amounting to $211,227.75. This deficiency is the result of certain adjustments contained in the attached schedules.

"You are granted 30 days from the date of this letter within which to present a protest, supported by additional evidence or brief, against this determination of a deficiency. Any additional evidence submitted should be under oath. Upon request submitted within the period mentioned, you will also be granted a hearing in the Bureau with reference to the matter."

"Schedule 1.

"Statement of Returns Examined and Resulting Tax Liability.

Returns Examined.

Company	Year	Form	Date filed
Newport Chemical Works, Inc. Milwaukee, Wisconsin	1916	1031	March 1, 1917
	1917	1031 and 1103	April 1, 1918

Resulting Tax Liability.

Company	Year	Additional Tax	Overassessment
Newport Chemical Works Milwaukee, Wisconsin	1916		$1.98
	1917	$211,227.75	

"Details of the adjustments resulting in the above overassessment are contained in schedules transmitted to you with Bureau letter dated December 3, 1924.

"Your brief of exceptions dated December 27, 1924, to-

gether with information submitted in conference February 5, 1925 have been made the basis of this audit.

"1927 waiver filed December 31, 1924 is in effect until April 1, 1926.

"The tax liability for 1916 is adjusted under Section 261(e) of the Revenue Act of 1924 relating to reduction in invested capital due to failure to take adequate deductions in previous years which has resulted in the payment in a previous year of an excessive tax.

"Certificate of overassessment for the amount shown above will be issued through the office of the Collector of Internal Revenue for your district and will be applied by that official in accordance with Section 201 (a) of the Revenue Act of 1924."

91 The above is followed by a statement showing how the additional tax determined was arrived at.

Upon proof of execution the following documents marked RESPONDENT'S EXHIBITS "L", "I", "H", "J", "M", "G" and "K" respectively were offered in evidence by the respondent and were received subject to the objections of the petitioner and made a part of the record of the case. The petitioner objected to each of the Respondent's Exhibits "I", "H", "J" and "G" as the same was offered on the ground that they were void and ineffectual as waivers because it appeared on their face that they purported to be executed as waivers by the Newport Chemical Works, Inc., as the taxpayer by an officer of the corporation after the corporation had ceased to exist.

Respondent's Exhibit "K" was objected to by counsel for petitioner on the ground that it purported to have been executed and dated November 10, 1926, relating to a tax liability of the Newport Chemical Works which as shown by the undisputed evidence was then dissolved and had ceased to exist as a corporation on the first of March, 1923, and because it was dated and executed after the 1926 Act which extinguished the liability. (Tr. 76)

92 RESPONDENT'S EXHIBIT "L".

"IT:SA:HR

Stamped: "Received
Dec. 18, 1920, Natural
Resources Subdivision."

Waiver.

"Newport Chemical Works, Incorporated, a corporation organized under the laws of the State of Maine, in consideration of the assurance given it by officials of the Income Tax Unit of the Bureau of Internal Revenue that its ability for all Federal taxes imposed by the Act of Congress, approved September 8, 1916, as amended by the Act of Congress approved October 3, 1917, for the year ended December 31, 1917 on its net income received from all sources in said year, shall not be determined except after deliberate, intensive and thorough consideration, hereby waives any and all statutory limitations as to the time within which assessments based upon such liability may be entered. It is understood, however, that the above corporation does not, by the execution of this waiver, admit in advance the correctness of any assessment which may be made against it for said year by the officials of the Income Tax Unit.

"Executed this 15th day of December 1920.

(Signed) NEWPORT CHEMICAL WORKS, INCORPORATED
Corporation

By EDW. G. WILMER,
Newport Chemical Works,
Inc., Maine.)
(Corporation Seal: *Vice-President*

Approved
D. H. BLAIR
Commissioner of Internal Revenue
A. H. F.

Attest:
WILMOT SAEGER,
Ass't. Secretary."

RESPONDENT'S EXHIBIT "I".

"Reference Symbols
IT:NR:G-EFS-5

"December 11, 1923
(Date)

Income and Profits Tax Waiver.

"In pursuance of the provisions of subdivision (d) of Section 250 of the Revenue Act of 1921, The Newport Mining Company of Maine with its principal office at Milwaukee, Wisconsin, and the Commissioner of Internal Revenue, hereby consent to a determination, assessment, and collection of the amount of income, excess-profits, or war-profits taxes due under any return made by or on behalf of the said company for the year 1917 under the Revenue Act of 1921, or under prior income, excess-profits, or war-profits tax acts, or under Section 38 of the Act entitled 'An Act to provide
93 Revenue, equalize duties, and encourage the industries of the United States, and for other purposes", approved August 5, 1909. This waiver to be effective until March 15, 1925, and applies to said The Newport Mining Company and affiliated companies included in the letter of the department dated August 13, 1923 with reference symbols IT:NR:G-KFS-5.

"THE NEWPORT MINING COMPANY
Taxpayer
By H. J. SCHLESINGER
Vice-President
D. H. BLAIR
Commissioner."

(No corporate seal)

RESPONDENT'S EXHIBIT H.

(Stamped: "Received Feb. 26, 1924 Natural Resources Audit Division)

"IT:NR:G:OM-5

Income and Profits Tax Waiver.

"In pursuance of the provisions of subdivision (d) of Section 250 of the Revenue Act of 1921, Newport Chemical Works, Inc., of Milwaukee, Wisconsin and the Commissioner of Internal Revenue, hereby consent to a determination, assessment, and collection of the amount of income, excess-profits, or war-profits taxes due under any return made by or

on behalf of the said corporation for the year 1917 under the Revenue Act of 1921, or under prior income, excess-profits, or war-profits tax Acts, or under Section 38 of the Act entitled 'An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes', approved August 5, 1909. This waiver is in effect from the date it is signed by the taxpayer and will remain in effect from the date it is signed by the taxpayer and will remain in effect for a period of one year after the expiration of the statutory period of limitation, or the statutory period of limitation as extended by nay waivers already on file with the Bureau, within which assessments of taxes may be made for the year or years mentioned.

"NEWPORT CHEMICAL WORKS, INC.
Taxpayer
By H. J. SCHLESINGER
Vice-President.

(Corporate Seal: Newport Chemical Works, Inc., Maine).

D. H. BLAIR
Commissioner, S. A.

"If this waiver is executed on behalf of a corporation, it must be signed by such officer or officers of the corporation as are empowered under the laws of the State in which the corporation is located to sign for the corporation, in addition to which, the seal, if any, of the corporation must be affixed."

94 RESPONDENT'S EXHIBIT J.

"IT:CR:G:OM-5 "December 23, 1924

Income and Profits Tax Waiver.

"In pursuance of the provisions of existing Internal Revenue Laws, Newport Chemical Works, Inc., a taxpayer, of Milwaukee, Wisconsin, and the Commissioner of Internal Revenue, hereby consent to extend the period prescribed by law for a determination, assessment, and collection of the amount of income, excess-profits, or war-profits taxes due under any return made by or on behalf of said taxpayer for the year 1917 under the Revenue Act of 1924, or under prior income, excess-profits, or war-profits tax Acts, or under Section 38 of the Act entitled 'An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes' approved August 5, 1909. This

waiver is in effect from the date it is signed by the taxpayer and will remain in effect for a period of one year after the expiration of the statutory period of limitation within which assessments of taxes may be made for the year or years mentioned, or the statutory period of limitation as extended by Section 277(b) of the Revenue Act of 1924, or by any waivers already on file with the Bureau.

"NEWPORT CHEMICAL WORKS, INC.
Taxpayer

By H. J. SCHLESINGER,
Vice-President

(Corporate Seal:
Newport Chemical Works,
Inc., Maine.)

D. H. BLAIR,
Commissioner.

L. T. L.

"If this waiver is executed on behalf of a corporation, it must be signed by such officer or officers of the corporation as are empowered under the laws of the State in which the corporation is located to sign for the corporation, in addition to which, the seal, if any, of the corporation must be affixed."

RESPONDENT'S EXHIBIT M.

Stamped: "Received
Consolidated Returns Audit
Division.

"IT:CR:G-5
ELS

Jan. 11, 1926."

"Before the Commissioner of Internal Revenue,
The Newport Chemical Works, Inc.

Protest Against Tentative Determination
of a Deficiency in Tax for the Taxable
Year 1917.

"IT:CR:G:5
ELS

"Protest of the Newport Chemical Works, Inc.
Before the Commissioner of Internal Revenue.
"Commissioner of Internal Revenue,
Washington, D. C.

Sir:

"Referring to the letter of the Department under date of December 14, 1925, with symbols IT:CR:G:5:ELS, the New-

port Chemical Works, Incorporated, hereby protests against the tentative determination of a deficiency in tax for the taxable year 1917 as set forth in said letter of the Department. For the purposes of the record, the following information is given:

95 (a) Name of taxpayer — Address — State in which incorporated

(b) Newport Chemical Works, Inc., — Carrollville, Wis. P. O. Box 1582 Milwaukee, Wis. — Maine

(c) Treasury Department's registered letter dated December 14, 1925—symbols IT:CR:G:5:ELS.

"Summary of Exceptions and Grounds on Which Same Are Based.

"The entire basis of the exceptions of the taxpayer to said determination of deficiency in tax is the omission of the Bureau to take into account in the determination of the tax liability of this taxpayer for the year 1917, the ruling heretofore made by the Department that this taxpayer was affiliated during the year 1917 with the Newport Mining Company. The ruling here referred to was communicated to the taxpayer by the registered letter of the Department dated April 14, 1925, with reference symbols, IT:E:Af, LWP, a true copy of which is hereto annexed marked Exhibit "A" and made part hereof.

"As the taxpayer has not been advised of any change in this ruling, it is assumed that it was overlooked or not brought to the attention of the Unit in connection with the determination of the tax liability of this taxpayer for the year 1917 and communicated to taxpayer in the letter of the Department first above referred to.

"The taxpayer therefore requests a re-determination by the Bureau of its income tax liability for the year 1917 based upon and taking into account the said ruling of the Department with reference to the affiliation of this taxpayer with the Newport Mining Company.

"The Newport Mining Company joins in this protest and request.

"A conference is hereby requested by the taxpayer unless without such conference a re-determination of its tax liability for the year 1917 shall be made upon the basis of its affiliation with the Newport Mining Company in accordance with the ruling above referred to.

"Waivers to Be Furnished.

"The taxpayer hereby places on record its willingness to file all required waivers to permit of the final determination of the above exceptions before the expiration of any period of limitation provided by law, and will forthwith transmit such waivers to be filed in connection herewith as soon as the same can be prepared and properly executed, and in the meantime and pending the receipt of such formal waivers, it agrees that this offer and agreement shall operate and have the full force and effect of such formal waivers in all respects as though the same were filed herewith.

"State of Wisconsin, }
"Milwaukee County, } ss.

"A. A. SCHLESINGER being first duly sworn says that he was during the year 1917 the vice-president and treasurer of the Newport Chemical Works, Inc., and continued as such until May, 1919, and thereafter was the president of the company until its dissolution in the year 1920.

96 "That prior to the dissolution of said company all of its assets and property was transferred to and taken over by the Newport Company, a corporation organized under the laws of Delaware which in consideration thereof assumed and agreed to pay all of the liabilities of said Newport Chemical Works, Inc. and said Newport Company has ever since continued to be the owner of all of such property and assets in so far as the same have been preserved or are still in existence. That this affiant is now president of the Newport Company and is in active charge, management and direction of its affairs.

"That he has read the foregoing protest and exceptions and that the same are true to the best of his knowledge, information and belief.

A. A. SCHLESINGER."

"Subscribed and sworn to before me this 8th day of January, A. D. 1926.

C. F. MIKHELSON
Notary Public, Milkaukee County, Wisconsin.
My Commission expires Oct. 2, 1927."

RESPONDENT'S EXHIBIT G.

"TREASURY DEPARTMENT
Internal Revenue Service

Form 872 A

"Income and Profits Tax Waiver for Taxable Years Ended Prior to January 1, 1922.

January 12th, 1926.

"In pursuance of the provisions of existing Internal Revenue Laws Newport Chemical Works, Inc., a taxpayer of Carrollville, Wis., P. O. Box 1582 Milwaukee, Wis., and the Commissioner of Internal Revenue hereby waive the time prescribed by law for making any assessment of the amount of income, excess-profits, or war-profits taxes due under any return made by or on behalf of said taxpayer for the year (or years) 1917 under existing revenue acts, or under prior revenue acts.

"This waiver of the time for making any assessment as aforesaid shall remain in effect until December 31, 1926, and shall then expire except that if a notice of a deficiency in tax is sent to said taxpayer by registered mail before said date and (1) no appeal is filed therefrom with the United States Board of Tax Appeals then said date shall be extended sixty days, or (2) if an appeal is filed with said Board then said date shall be extended by the number of days between the date of mailing of said notice of deficiency and the date of final decision by said Board.

NEWPORT CHEMICAL WORKS, INC.
Taxpayer

H. J. SCHLESINGER,
Vice-President.

(Corporate Seal:
Newport Chemical Works,
Inc., Maine.)

D. H. BLAIR,
Commissioner."

"If this waiver is executed on behalf of a corporation, it must be signed by such officer or officers of the corporation as are empowered under the laws of the State in which the corporation is located to sign for the corporation, in addition to which, the seal if any, of the corporation must be affixed."

97 RESPONDENT'S EXHIBIT K.

"IT:CR:G-5:ELS "November 6, 1926."

"Report of Mining Company, Parent.

"In pursuance of the provisions of existing Internal Revenue Laws Newport Chemical Works, a taxpayer of Milwaukee, Wisconsin, and the Commissioner of Internal Revenue hereby waive the time prescribed by law for making any assessment of the amount of income, excess-profits, or war-profits taxes due under any return made by or on behalf of said taxpayer for the years 1917 and 1918, period ended June 30, 1919 under existing revenue acts, or under prior revenue acts.

"This waiver of the time for making any assessment as aforesaid shall remain in effect until December 31, 1927, and shall then expire except that if a notice of a deficiency in tax is sent to said taxpayer by registered mail before said date and (1) no appeal is filed therefrom with the United States Board of Tax Appeals then said date shall be extended sixty days, or (2) if an appeal is filed with said Board then said date shall be extended by the number of days between the date of mailing of said notice of deficiency and the date of final decision by said Board.

THE NEWPORT COMPANY
Taxpayer

By A. A. SCHLESINGER (Sgd)
President.
As successor in Interest to the Newport Chemical Works.

(Corporate Seal: The Newport Company.)

D. H. CLAIR (Sgd)
Commissioner

A. B. M.

"If this waiver is executed on behalf of a corporation, it must be signed by such officer or officers of the corporation as are empowered under the laws of the State in which the corporation is located to sign for the corporation, in addition to which, the seal, if any, of the corporation must be affixed."

RESPONDENT'S EXHIBIT Q.

"THE NEWPORT COMPANY

"Milwaukee, Wisconsin
February 23, 1924.

"Treasury Department
Commissioner of Internal Revenue,
Washington, D. C.

Reference: IT:NR:G-CEMcC

Dear Sirs:

"In compliance with the request contained in your letter of February 11th addressed to the Newport Mining Company, 1120 First National Bank Building, Milwaukee, Wisconsin, we are pleased to enclose to you the following waivers:

98

"Newport Turpentine & Rosin Company, Ala.	1918
Newport Turpentine & Rosin Company, Fla.	1917 & 1918
Newport Chemical Works, Inc.	1717 & 1918
Gogebic Steel Company	1918
The Milwaukee Coke & Gas Company	1918
Milwaukee Solvay Coke Company	1918
Elkhorn Piney Coal Mining Company	1918
St. Clair Coal Mining Company	1918
Northwestern Iron Company	1917

"The waivers which you included in your letter of February 11th for the Harrow Spring Company, Northwestern Milling Company, Northwestern Light & Power Company, and Dunn Iron Mining Company, were upon the receipt of your letter, immediately forwarded to the Youngstown Sheet & Tube Company for execution by their officers, as they are the successors to these companies and have their records at Youngstown. These waivers have not been returned to us and it may be that they are being forwarded to you direct from Youngstown, although we requested that they be returned to us so that we could send all waivers referred to in your letter of February 11th together. We have wired The Youngstown Sheet & Tube Company this morning to see that the waivers are forwarded to you today if they have not already been forwarded.

Yours very truly,
C. W. WESTERMAN,
Secretary."

With respect to respondent's Exhibit Q, the following evidence was received:

(*Questions by Mr. Johnston Directed to Mr. J. E. Kupperian.*)

Question: "Mr. Kupperian, what position did Mr. Westerman hold with the Newport Company?"

Answer: "During certain periods he was secretary."

Question: "He was secretary on February 23, 1924?

Mr. Fawsett: "If his name is signed there as secretary we admit that he was secretary at that time."

Thereupon the respondent rested and the following evidence for the petitioner was received in rebuttal:

It was conceded by counsel for respondent, upon request of counsel for the petitioner, that Mr. Armin A. Schlesinger, the President of the Newport Company, and H. J. Schlesinger, former vice president of Newport Chemical Works, Inc., and Mr. J. E. Kupperian, were all subpoenaed by the Commissioner on behalf of the United States and were there present at the hearing under those subpoenas.

99 J. E. KUPPERIAN recalled as witness for the petitioner, referring to petitioner's Exhibit No. 8, for identification, further testified:

This is my signature to the document handed me. It is a copy of a return that I caused to be filed with the Collector of Internal Revenue at Milwaukee, Wisconsin, for the year 1920, for the Newport Chemical Works, Incorporated, Maine, sometime in the Spring of 1921. Upon said document (marked for identification as petitioner's Exhibit 8) being handed to counsel for the Commissioner for examination, it was then received in evidence over the objection of counsel for the Commissioner. A photostat copy of petitioner's Exhibit No. 8 is attached hereto and made a part hereof, upon request of counsel for the Commissioner.

Referring to what purported to be a copy of a letter which was handed to the witness, marked petitioner's Exhibit No. 9, for identification, J. E. KUPPERIAN testified:

That is a letter that I wrote. The original of that letter was duly addressed according to the address in the letter and duly stamped and mailed.

Thereupon, PETITIONER'S EXHIBIT NO. 9, was re-

ceived in evidence, over objection of counsel for the respondent, and is as follows:

"March 8, 1921.

"Collector of Internal Revenue,
Milwaukee, Wisconsin.

Dear Sir:

"We are enclosing herewith Form No. 1120, Corporation Income and Profits Tax Return for the year 1920 for the Newport Chemical Works, Incorporated.

"You will note that the company did not operate during the year and hence no income earned. You will further note that the company's affairs have been wound up and the company legally dissolved.

Yours very truly,
NEWPORT CHEMICAL WORKS, INC.,
By .....,"

JEK:CN"

The following letter, identified as PETITIONER'S EXHIBIT 13, was offered in evidence and reda into the record:

100

"August 10, 1921.

"The Newport Company,
452 East Water Street,
Milwaukee, Wisconsin.

Sirs:

"Reference is made to an executed affiliated corporations questionnaire filed by your corporation for the taxable year 1919. It is noted that on pages 10 and 11 of the questionnaire certain companies are referred to as being in process of dissolution and cancellation of stock, as follows:

"The Newport Mining Company,
Newport Chemical Works, Inc., Maine,
Newport Turpentine & Rosin Company, Inc.
Newport Turpentine & Rosin Company of Florida,
Gogebic Steel Company.

"You are requested to give the exact dates on which the respective charters of the above-named companies were surrendered to the State for cancellation.

"If the same condition as described in the completed questionnaire for 1919 obtained throughout the entire years 1917 and 1918, an affidavit to that effect should be submitted.

"If the same condition did not obtain in 1917 and 1918 as in 1919, a complete statement of all changes should be submitted in affidavit form. Statement of changes in stockhold-

ings should be prepared in the form prescribed in table 3 and 6 of this questionnaire.

"Papers submitted in accordance with the requirements stated above should be transmitted to this office within twenty days from the date of tihs letter.

"In your reply, please refer to IT:SA:CR:Af-PJC-4.

"Respectfully,
E. H. BATSON,
Deputy Commissioner,
By L. E. RUSCH
Acting Chief of Subdivision."

EXHIBITS 11 and 12, original documents on file with the Bureau of Internal Revenue were thereupon read into the record and were thus received in evidence over the objection of counsel for the Commissioner, after having been marked for identification:

EXHIBIT 11.

"THE NEWPORT COMPANY
Milwaukee, Wis.
Aug. 26, 1921.

"Commissioner of Internal Revenue,
Washington, D. C.

"Gentlemen:

Re: IT:SA:CR:Af-PJC-4

"In reply to your letter of August 10th we beg to 101 enclose herewith the data called for in affidavit form.

Should the matters which you had in mind when writing not be fully covered hereby, please advise us and we will supplement it as desired.

Very truly yours,
THE NEWPORT COMPANY,
By FREDERICK R. WAHL,
Secretary."

EXHIBIT 12.

"State of Wisconsin
County of Milwaukee } ss.

"FREDERICK R. WAHL, being first duly sworn on oath deposes and says that he is the Secretary of The Newport Company, having an office at 425 East Water Street, in the City of Milwaukee, State of Wisconsin. This affiant refers

to a letter under date of August 10, 1921 written by E. H. Batson, Deputy Commissioner of Internal Revenue, to said Company bearing reference letters as follows: IT:SA:CR: AF:PJC-4.

"That on pages 10 and 11 of the affiliated corporations' questionnaire filed by said The Newport Company for taxable year 1919, certain corporations are referred to as being in process of dissolution; that the dates upon which said companies were dissolved either by decree of the appropriate court or by certificate issued by the appropriate administrative officer are as follows:

"The Newport Mining Company—March 1, 1920,
Newport Chemical Works, Inc. (Maine), March 1, 1920,
Newport Turpentine & Rosin Co., October 1, 1919,
Newport Turpentine & Rosin Co. of Fla., September 13, 1919,
Gogebic Steel Company, June 15, 1920.

"That all of the aforesaid corporations were in process of dissolution from and after July 30, 1919, the interval between said date and the actual date of the decree or certificate aforesaid being necessary to accomplish transfers of property and legal formalities in connection with the dissolutions;

"That in said letter aforesaid it is asked whether the same conditions set forth in said affiliated corporations' questionnaire obtained during the years 1917 and 1918 as existed in 1919, to which question this affiant replies that in view of the fact that The Newport Company was incorporated in the state of Delaware on the 14th day of July, 1919, if had no corporate existence prior to that date and hence no corporate affiliations whatsoever.

"And further this deponent saith not.

"FREDERICK R. WAHL."

"Subscribed and sworn to before me this 26th day of August, 1921.

ELLA PORT,
Notary Public, Milwaukee County, Wisconsin.

My Commission expires June 18, 1922."

102 Thereupon, at the request of counsel for petitioner, counsel for the Commissioner produced from the files of the office of the Commissioner a document which was marked for identification, PETITIONER'S EXHIBIT 16, being the Affiliated Corporations Questionnaire filed by the Newport Company for the taxable year 1919 from which the petitioner

offered and there was received in evidence the following portions of said exhibit:

Taxpayer THE NEWPORT COMPANY,
Address 425 East Water Street,
Milwaukee, Wisconsin.

"Jurat, page 35:

"We the undersigned general officers of The Newport Company being duly sworn, each for himself deposes and says that the answers to the questions herein, including statements and figures entered in the accompanying tables and in any additional tables, statements and schedules attached hereto, are, to his best knowledge and belief, true and correct in each and every particular.

"Signed A. A. SCHLESINGER
President.
H. J. SCHLESINGER,
Vice President and Treasurer.

"Sworn to and subscribed before me this 14th day of April, 1920.

"C. W. WESTERMAN,
"*Notary Public, Milwaukee County, Wisconsin.*"

Table 1
Companies to Be Considered for Consolidation

Name of Company	Address	Nature of Business	State or County in which incorporated
Parent or principal Company:			
1. The Newport Company	425 E. Water St., Milwaukee, Wis.	Manufacturing & Selling colors & intermediates, rosin, turpentine & pine oil	Delaware
2. The Newport Mining Company	425 E. Water St., Milwaukee, Wis.	Mining & Selling ore & general merchandising	Maine
3. Newport Chemical Works, Inc., Del.	Passaic, N. J.	Manufacturing & Selling colors & intermediates	Delaware
4. Newport Turpentine & Rosin Co., Del.	Passaic, N. J.	Buying & Selling Rosin, Turpentine & Pine Oil	Delaware
5. Newport Chemical Works, Inc., Maine	425 E. Water St., Milwaukee, Wis.	Manufacturing & Selling colors & intermediates	Maine

The following from pages 11 and 10, respectively, of the same document was received in evidence:

103 Company No. 5—(The Company number agreeing with the line number of Table No. 1, *supra*). Company in process of dissolution—stock cancelled.

Company No. 2—(The company number agreeing with the line number of Table No. 1): Company in process of dissolution—stock cancelled.

Objection was made to the above by counsel for the Commissioner on the ground that it related to the taxable year 1919 and not to the year involved in the proceeding before the Board and was not notice to the Commissioner in proceedings relating to the year 1917. This objection was overruled and an exception was noted.

Thereupon, upon proof by J. E. Kupperian of execution by the Collector of Internal Revenue, Milwaukee, Wisconsin, the following document was received in evidence as PETITIONER'S EXHIBIT NO. 14:

EXHIBIT 14.

"The Newport Company
First Wisconsin National Bank Bldg.,
Milwaukee, Wisconsin.

April 14, 1920.

"Received the following corporation and profits tax Forms:

Forms 1120, 1126 and 1120-S, Consolidated Form 1122.
Harvest Farms Company
Newport Chemical Works, Inc., (Maine)
The Newport Mining Company
Newport Turpentine & Rosin Company, Inc.
Newport Turpentine & Rosin Company of Florida
Gogebic Steel Company
(Hand stamped)
Rec'd—63-50
April 14, 1920
2nd Wisconsin."

Thereupon, upon proof of execution and mailing, by the testimony of J. E. Kupperian, the following document was received in evidence as PETITIONER'S EXHIBIT NO. 15:

104 EXHIBIT NO. 15.

"THE NEWPORT COMPANY

April 14, 1920.

"Mr. Bert Williams,
Collector of Internal Revenue,
Milwaukee, Wisconsin.

Dear Sir:

"We are enclosing you herewith Corporation Income and Profits Tax Return, Form No. 1120 for the calendar year 1919, Inventory Certificate—Form No. 1126, Government Contracts Profits Tax Returns—Form No. 1120-S for the following affiliated companies supported by detailed schedules:

"The Newport Company
The Newport Mining Company
Newport Chemical Works, Inc., (Delaware)
Newport Turpentine & Rosin Company (Delaware)
Newport Chemical Works, Inc. (Maine)
Newport Turpentine & Rosin Company, Inc.
Newport Turpentine & Rosin Company of Florida
Harvest Farms Company
Gogebic Steel Company

"We are also enclosing information returns of subsidiary or affiliated corporations—Form No. 1122—for the following companies:

"The Newport Mining Company
Newport Chemical Works, Ins., (Maine)
Newport Turpentine & Rosin Company, Inc.
Newport Turpentine & Rosin Company of Florida
Harvest Farms Company
Gogebic Steel Company

"Please be advised that this is a final return for the following companies:

"The Newport Mining Company
Newport Chemical Works, Inc., (Maine)
Newport Turpentine & Rosin Company, Inc.
Newport Turpentine & Rosin Company of Florida
Gogebic Steel Company

"These companies have wound up and are no longer engaged in business.

"Your very truly,

H. H. SPRINGFORD,
Secretary.

By .....

"HEL/GC"

105 J. E. KUPPERIAN, as witness for the petitioner, testified as follows with reference to petitioner's Exhibits 14 and 15, supra:

The letter and the receipt, petitioner's Exhibits 15 and 14, respectively, were found by me in the files in my custody as secretary of the Newport Company. They were found by me in the regular income tax files of the company which are in my custody as vice-president and auditor of the company: It was the practice of the Newport Company to keep regular and systematic files of all such matters.

Thereupon a certain document marked for identification as petitioner's Exhibit No. 17, being identified by J. E. Kupperian as received by the Newport Company in regular course of mail was received in evidence. Said document is as follows:

EXHIBIT 17.

"IT:SA:CR:AF
CCJ

"June 17, 1922

"The Newport Company,
First Wisconsin National Bank Building,
Milwaukee, Wisconsin.

"Sirs:

"Reference is made to the executed Affiliated Corporations Questionnaires for the taxable year 1919 and the Consolidated income and profits tax returns filed by your company, The Milwaukee Coke and Gas Company and The Steel and Tube Company of America for the taxable years 1919 and 1920.

"From the facts presented, you are advised that during the taxable years 1919 and 1920, the companies listed below were affiliated as indicated within the purview of Section 240 of the Revenue Act of 1918.

"Affiliated during the period from January 1, 1919 to June 30, 1919.

"Newport Mining Company
Dunn Iron Mining Company
Newport Chemical Works Incorporated
The Northwestern Iron Company
Northwestern Light and Power Company

Northwestern Milling Company
Northwestern Lime Stone and Slag Company
Harrow Spring Company
Newport Turpentine and Rosin Company, Inc.
Newport Turpentine and Rosin Company of Florida
Gogebic Steel Company
Harvest Farms Company
The Milwaukee Coke and Gas Company
The Milwaukee Solvay Coke Company
Elkhorn Piney Coal Mining Company
St. Clair Coal Mining Company

106 "The above group should, therefore, have filed a consolidated income and profits tax return for the period from January 1, 1919 to June 30, 1919.

"Affiliated during the period from July 1, 1919 to December 31, 1919.

"Group A:

"The Newport Company.
Newport Chemical Works, Inc., (Del.)
Newport Turpentine and Rosin Company (Ada.) (to date of dissolution October 1, 1919).
Newport Chemical Works Incorporated (Me.)
Newport Turpentine and Rosin Company, Incorporated, (Del.)
Newport Turpentine & Rosin Company of Florida (to date of dissolution, September 13, 1919)
Harvest Farms Company
Gogebic Steel Company.

"Group B:

"The Milwaukee Coke and Gas Company.
Elkhorn Piney Coal Mining Company.
St. Clair Coal Mining Company.
Milwaukee Solvay Coke Company.

"Each of the above groups should, therefore, have filed a consolidated income and profits tax return for the period from July 1, 1919 to December 31, 1919, including the companies named for the respective periods indicated.

"In the event that such returns should be needed in the audit of the case, you will be so informed by this office.

"Affiliated during the taxable year 1920:

"Group A:

"The Newport Company.
Newport Turpentine & Rosin Company (Del.).
Newport Chemical Works, Incorporated (Me.) (to date of dissolution, March 1, 1920).
Newport Chemical Works, Incorporated (Del.).

Harvest Farms Company.
Gogebic Steel Company (to date of dissolution, June 15, 1920).
"Group B:
"The Milwaukee Coke and Gas Company.
Elkhorn Piney Coal Mining Co.
St. Clair Coal Mining Company.
Milwaukee Solvay Coke Company.
"Group C:
"Steel and Tube Company of America.
The Mark Manufacturing Company.
The Iroquois Iron Company.
Harrow Spring Company.
National Zinc Separating Company.
Northwestern Lime, Stone and Slag Company.
Vinegar Hill Zinc Company.
Northwestern Light and Power Company.
Redfield Coal Company.
Northwestern Milling Company.
Mark Corporation.
Northwestern Iron Company.
Atlas Supply Company.
Dunn Iron Mining Company.

107 "Each of the above groups should file a consolidated income and profits tax return for the taxable year 1920, provided such action has not been taken.

"You are further advised that during the taxable years 1919 and 1920 and the portions of those years as indicated, the companies listed below were not affiliated within the purview of the authority cited above, and should, unless such action has already been taken, file a separate income and profits tax return for each of the years and periods indicated:

"Newport Mining Company (from July 1, 1919 to date of dissolution March 1, 1920).
"Mark-Lally Company, (for 1920).
"Rogers, Brown Ore Company (for 1920).
"A copy of this letter should be attached to each return when filed pursuant to the ruling contained herein.
"If not in agreement with this ruling, you are requested to submit an answer within thirty days from the date of this letter, referring to IT:SA:CR:Af-CCJ."

"Respectfully,
E. H. Batson,
Deputy Commissioner.
By Wm. T. Bird,
Chief of Subdivision."

Thereupon, the following document, being a letter mailed to the Commissioner of Internal Revenue by the Newport Company, was offered in evidence for the petitioner and was received as PETITIONERS' EXHIBIT NO. 18.

"THE NEWPORT COMPANY.

"July 27th, 1922.

"Commissioner of Internal Revenue,
Washington, D. C.

IT:SA:CR:AF:CCJ

Dear Sir:

"Referring to your letter of June 17th in which you outline on page two certain groupings of Companies affiliated during the taxable year of 1920. The Companies listed under Group A have been filed in accordance with your letter, with the following exceptions:

"Newport Chemical Works, Inc. (Maine) to date of dissolution, March 1st, 1920, has not been included in the return for 1920 for the reason that this Company transacted no business whatsoever during the year. We have however, filed a separate return and forwarded same to the Collector of
108 Internal Revenue, Milwaukee, under date of March 8th, 1921, and mentioned at that time that the Company did not operate during the year and no net income was earned.

"The Gogebic Steel Company to date of dissolution, June 15th, 1920 has not been included in the consolidated return, for the same reason mentioned under Newport Chemical Works. The return for 1920 of this Company has also been made to the Collector of Internal Revenue, Milwaukee under date of March 8th, 1921, in which we mentioned that no net income was earned for the year 1920.

"Groups B and C mentioned on page three of your letter have been filed in accordance with your line up.

"We are unable to give any information on your paragraph on page three regarding Newport Mining Company, Mark-Lally Company, and Rogers Brown Ore Company. We understand that this will be taken care of from the Chicago Office of the companies mentioned.

"Yours very truly,
J. E. KUPPERIAN,
Auditor."

Thereupon the petitioner offered the following letter to the Newport Mining Company, identified as PETITIONER'S EXHIBIT NO. 19, as being the request for waivers which

was complied with as indicated by the letter theretofore received in evidence as respondent's Exhibit "Q." PETITIONER'S EXHIBIT NO. 19 was received in evidence without objection, and is as follows:

EXHIBIT 19.

"February 11, 1924.

"IT:NR:G
CBMcC
"Newport Mining Company,
1112 First National Bank Building,
Milwaukee, Wisconsin.
"Sirs:

"Reference is made to your appeal from the findings of the Income Tax Unit regarding your income tax liability for 1917, and to the returns filed by you and your affiliated companies for 1918.

"The limitation under the statutes for making assessment of income tax for 1917 will expire April 1, 1924, and that for 1918 shortly thereafter. Because of the limited time for making assessment and collection of any additional tax that may be found due, the Bureau will be unable to give the usual careful consideration to your case without an extension of the period during which assessment may be made. It is therefore requested that the enclosed forms of waiver be executed and returned to this office not later than February 25, 1924. Waivers executed by you have been received, but waivers are enclosed for the subsidiaries named below. Waivers for 1918 for the companies not listed below will be requested by the representative of the Bureau who is examining the books of the companies located in Youngstown, Ohio.

109 "Newport Turpentine and Rosin Company of Alabama, 1918.

Newport Turpentine and Rosin Co. of Florida, 1917 and 1918.

Newport Chemical Works, Inc. 1917 and 1918.
Gogebic Steel Company 1918.
Milwaukee Coke and Gas Company 1918.
Milwaukee Solvay Coke Company 1918.
Elkhorn Piney Coal Mining Company 1918.
St. Clair Coal Mining Company 1918.
Harrow Spring Company 1917.
Northwestern Iron Company 1917.
Northwestern Milling Company 1917.

Northwestern Light and Power Company 1915 and 1917.
Dunn Iron Mining Company 1917.

Respectfully,
J. G. BRIGHT,
Deputy Commissioner.
By (Signed) W. C. TUNGATE,
Chief of Section."

"Enclosures:
16 waiver forms."

At the hearing certain income tax waivers herein before set out were received in evidence subject to objections of counsel as to competency and relevancy, and the Member reserved ruling thereon. At the conclusion of the hearing the Member stated:

"That in the event of adverse ruling in reference to evidence which was taken subject to objection, the party against whom the ruling goes will have an exception reserved in his favor." (Tr. 254, 250).

Subsequent to the hearing the Board overruled the objection of counsel for the petitioner as to the receipt in evidence of each of respondent's exhibits (L), (I), (H), (J), (G), and (K), and noted an exception in favor of the petitioner.

Approved and ordered filed this 25th day of Nov. 1932.

(s) STEPHEN J. MCMAHON,
Member.

110 Page 1 of Return

Form 1120—United States Internal Revenue Service

CORPORATION INCOME AND PROFITS TAX RETURN

For Calendar Year 1920

Or for period begun ....., 19....., and ended ....., 19.....

(Print Plainly Corporation's Name and Business Address)

Newport Chemical Works, Inc., Inc.
1112—1st Wis. Natl. Bank Bldg.,
Milwaukee, Wis.

If the net income includes more than $10,000 from Government contracts, procure from the Collector of Internal Revenue for your district Form 1120S, execute and file the same as a part of this return.

Cash Check M. O. Cert. of Ind.

If return is for calendar year 1920 file it with the Collector of Internal Revenue for your district on or before March 15, 1921.

If for a period other than a calendar year the return should be filed on or before the 15th day of the third month following the close of such period.

(Do Not Write in this Space)

Examined by .....

Audited by .....

First Payment $.....

Cashier's Stamp

Kind of Business..... Is This a Consolidated Return?.....

Schedule A—Taxable Net Income.

Gross Income.

1. Gross sales, less returns and allowances.....$.....
2. Less cost of goods sold, exclusive of expenses, repairs, and other items called for separately below (from Schedule A2)..... .....
3. Gross income from operations other than trading or manufacturing, less allowances (from Schedule A3) ....
4. Taxable interest on obligations of the United States and War Finance Corporation Bonds (from Form 1125, see Schedule A4)..... .....
5. Taxable interest from all other sources (from Schedule A5) ....

6. Rentals .....
7. Royalties .....
8. Share of net income earned by personal service corporation during its accounting period (whether received or not) .....
9. Dividends on stock of (*a*) foreign corporations (from Schedule A9), $.....; and (*b*) domestic corporations, except personal service corporations from earnings accumulated on and after January 1, 1918, $..... Total .....
10. Gross income from all other sources (not including any amount reported in Item 22, below) (from Schedule A10) .....
11. TOTAL OF ITEMS 1 TO 10 ..... $.....

Deductions.

12. Ordinary and necessary expenses (except amounts reported in Item 2 above or called for separately below) (from Schedule A12) ..... $.....
13. Compensation of officers (including salaries, commissions, and other compensation in whatever form paid) (from Schedule A13) .....
14. Repairs (including labor, supplies, etc.) (from Schedule A14) .....
15. Interest (see page 2 of Instructions, paragraph 9) .....
16. Taxes (from Schedule A16) .....
17. Debts ascertained to be worthless and charged off within the taxable period (from Schedule A17) .....
18. Exhaustion, wear and tear (including obsolescence) (from Schedule A18) .....
19. Depletion (from Schedule A19) .....
20. TOTAL OF ITEMS 12 TO 19 ..... $.....
21. DIFFERENCE BETWEEN ITEMS 11 AND 20 ..... $.....
22. Profit or loss on sales of capital assets and miscellaneous investments, including liquidating dividends (from Schedule A22) ..... $.....
23. Losses sustained during the taxable period and not compensated for by insurance or otherwise. (From Schedule A23.) Extend to last column sum of difference between Items 22 and 23) .....
24. Net income for taxable period exclusive of deductions for dividends and amortization (sum of or difference between Items 21 and 23, the latter as extended) ..... $.....
25. Dividends on stock of (*a*) foreign corporations

taxable by the United States on their net incomes, and (*b*) domestic corporations, except personal service corporations from earnings accumulated on and after January 1, 1918 ..... $.....

26. Amortization of war facilities (from Schedule A26) (extend total of Items 25 and 26) ....

27. NET INCOME FOR TAXABLE PERIOD (difference between Items 24 and 26, the latter as extended—to be entered as Item 5, Schedule D) ..... $ none

28. Less deduction provided in the first paragraph of Section 23, Merchant Marine Act of 1920 (see page 1 of Instructions, paragraph 4) ....

29. Net income of a corporation owning ships engaged in foreign trade (amount to be used only in computing profits tax in Schedule D) ..... $.....

Schedule B—Invested Capital.

ITEM.

1. Capital, surplus, and undivided profit beginning of taxable period as shown by books (from Schedule E, Item 11) ..... $.....
2. Plus adjustments by way of additions (from Schedule 4, Item 4) ....
3. TOTAL ..... $.....
4. Less adjustments by way of deductions (from Schedule G, Item 7) ....
5. REMAINDER ..... $.....
6. Plus or minus changes in invested capital during taxable period (Net Increase or Decrease from Schedule H) ....
7. TOTAL (OR REMAINDER) ..... $.....
8. Less deduction on account of inadmissible assets (from Schedule J) ....
9. Invested capital for taxable period. (If return is for a period less than a full year, see page 2 of Instructions, paragraph 11) ..... $.....

Schedule C—Excess Profits Credit.

1. Eight per cent of invested capital for taxable period (Item 9 of Schedule B) ..... $.....
2. Exemption ($3,000) (except for foreign corporations) ....

3. Excess Profits Credit (Item 1 plus Item 2). (If return is for a period less than a full year, see page 2 of Instructions, paragraph 11) ..... $

Schedule D—Computation of Taxes.

1. Brackets.	2. Amount of Net Income (Items 27 or 29, Schedule A) in Each Bracket.	3. Excess Profits Credit (Item 3, Schedule C).	4. Balance Subject to Tax.	5. Rate.	6. Amount of Tax.
1. Net income, not in excess of 20% of invested capital	$	$	$	20%	$
2. Balance of net income				40%	
3. Totals computed under Section 301 (b)	$	$	$		$

4. Excess Profits Tax, if computed under Sections 302, 303, 304 (c) or 337 of the Revenue Act of 1918 (see page 2 of Instructions, paragraph 14) ..... $
5. Net income for taxable period (Item 27, Schedule A) ..... $
6. Less: Taxable interest on obligations of United States and War Finance Corporation Bonds (Item 4, Schedule A) ..... $
7. Excess profits tax (Item 3 or 4, column 6, Schedule D) or .....
8. Excess profits and war profits taxes (Item 16, Form 1120S, income from Government contracts) .....
9. Exemptions, except for foreign corporations, $2,000 unless return is for less than a year (see page 2 of Instructions, paragraph 11) .....
10. Balance subject to income tax (Item 5, less Items 6, 7, and 9, or Item 5, less Items 6, 8, and 9) ..... $
11. Tax of 10% on Item 10 ..... $
12. Total tax (Item 3, 4, or 8 plus Item 11) ..... $
13. Less: Income and profits taxes paid to foreign countries or possessions of the United States. (See Sections 238 and 240 (c) of Revenue Act of 1918) ..... $
14. Income tax withheld at the source in case of a

foreign corporation not engaged in a trade or business within the United States, and not having any office or place of business therein..... .....

15. Balance of tax (Item 12 minus Items 13 and 14)..$.....

Amended Returns.

An amended return must be plainly marked "Amended" across the face of the return.

Checks and Drafts.

Checks and drafts will be accepted only if payable at par at your Collector's office.

Page 2 of Return

111 Schedule E.—Capital, Surplus, and Undivided Profits as Shown by Books Before Any Adjustments Are Made Therein.

E4. Stock actually outstanding at the end of the preceding taxable period should be entered in this schedule to the extent that it is paid up. If stock or shares were issued at a nominal value or without par value the entries should reflect the amounts on the books in respect thereof at the close of the preceding taxable period.

E5. This item should include paid-in surplus as shown by books at the end of the preceding taxable period. If any amount is claimed under Section 326(a) (2) of the Revenue Act of 1918 or under Article 837 of Regulations 45, the amount claimed should be entered under Item 1, Schedule F, and not in this schedule.

E7. Reserves which represent allocations of surplus and were not accumulated through deductions made in computing net income as returned in previous years may, if properly explained, be entered as Item 7. Such entries should be identified and if necessary reconciled with balance-sheet reserves.

E10. If the corporation had on hand at any time during the taxable period any treasury stock, copies of the journal entries covering the original issuance, repossession and any subsequent adjustments should be furnished. Treasury stock includes all stock reacquired by the corporation and not canceled, regardless of the reason for the acquisition.

Item.	Amount.
Capital stock paid up and actually outstanding at the close of the preceding year:	
1. First preferred	.....$.....

2. Second preferred .....
3. Common .....
4. TOTAL .....$.....

Surplus and undivided profits:

5. Paid-in surplus .....
6. Earned surplus and undivided profits.....
7. Reserves, additions to which are not deductible in computing net income (to be reconciled with balance-sheet items).....
8. Other items (to be detailed).....
9. TOTAL OF ITEMS 4, 5, 6, 7, AND 8.....$.....
10. Deduction on account of treasury stock.....
11. Capital and surplus at beginning of taxable period as shown by books.....$.....

Schedule F.—Adjustments By Way of Additions.

F1. If an addition to invested capital is claimed in Item 1, Schedule F, submit a statement showing (*a*) the kind of property, (*b*) the year in which it was paid in, (*c*) from whom acquired, explaining his relationship to the corporation, (*d*) the actual cash value of such property at the date when paid in, (*e*) the par value of stock or shares issued therefor and the amount at which such property was entered in the accounts, (*f*) the basis upon which the actual cash value of the property was determined and the date when such determination was made, and (*g*) the amount of depreciation sustained on such property from the date of acquisition to the beginning of the taxable period.

F2. If an addition to invested capital is claimed in Item 2, Schedule F, submit a statement showing (*a*) the kind of property, (*b*) the year in which it was acquired, (*c*) its cost, (*d*) the amount of depreciation sustained on such property from the date of acquisition to the beginning of the taxable period. State also whether each item sought to be restored was actually used or usable at the beginning of the taxable period. Were these expenditures, when made, written off in lieu of depreciation? ..... If so, explain what adjustments have been made to provide for depreciation in view of the proposed restoration to surplus. Additions in this item are cumulative to the beginning of the taxable period. For all additions hereunder provision must be made for depreciation to the beginning of the taxable period.

F3. If any addition to invested capital is claimed in Item 3, Schedule F, state specifically the amount of depreciation written off each year in the books of the company and the amount allowed as a deduction in computing net income.

Additions to this item are cumulative to the beginning of the taxable period.

Item.	Amount.
1. Actual cash value of tangible property clearly and substantially in excess of par value of stock issued therefor or of the cash or other consideration paid therefor (Articles 836 and 837).....	$.....
2. Additions to surplus (Articles 840 to 843).....	.....
3. Depreciation or depletion charged in the accounts of the corporation but disallowed by the Department as a deduction on income tax returns.....	.....
4. Total.....	$.....

Schedule G.—Adjustments by Way of Deductions.

G1. Is any patent, copyright, secret process, or formula, good will, trade-mark, trade brand, franchise, or other similar intangible property, paid in for stock, carried as an asset by the corportion? ..... If not entered specifically as such, is the intangible value merged under any other title or titles on the books or balance sheets submitted with this return? ..... Is it entered on the books at a value in excess of its actual cash value when paid in? ..... In excess of the par value of the stock issued therefor? ..... Is the aggregate of such assets acquired prior to March 3, 1917, entered on the books at a value in excess of 25 per cent of the par value of the stock outstanding on March 3, 1917? ..... Is the aggregate of such assets entered on the books at a value in excess of 25 per cent of the par value of the stock outstanding at the beginning of the taxable period? .....

If the answer to any of the foregoing questions is "yes," submit a statement showing separately with respect to such assets acquired (1) before March 3, 1917, and (2) on or after that date, (a) date of acquisition; (b) cash value at that date, with a complete explanation of the basis upon which such cash value was determined; (c) par value of the stock issued therefor; (d) par value of total stock outstanding March 3, 1917; (e) par value of total stock outstanding at the beginning of the taxable period; (f) the value at which such assets are entered on the books of the corporation.

If all the intangibles were acquired before March 3, 1917, the amount by which (f) exceeds (b), (c), 25 per cent of (d), or 25 per cent of (e), whichever is lowest, must be entered as Item 1, Schedule G, for the taxable period.

If the intangibles were acquired on or after March 3, 1917, the amount by which the entry in (f) relating to such intangibles exceeds (b) or (c) relating thereto, or 25 per cent of (e), whichever is lowest, must be included in Item 1, Schedule G, for the taxable period: Provided, That if intangibles were acquired before March 3, 1917, and also on or after that date, deduction shall be made so that the amount included in invested capital for the aggregate of intangibles shall not exceed 25 per cent of the par value of the total stock outstanding at the beginning of the taxable period.

Note.—If the stock of the corporation was issued at a nominal value or without par value, for the purpose of the computation under Item 1, the par value shall be deemed to be the fair market value as of the date or dates of issue. The aggregate value so determined of stock outstanding on March 3, 1917, or at the beginning of the taxable period, shall be the basis for the computation.

G2. Is any tangible property, paid in for stock, carried as an asset by the corporation? ..... If so, is it entered on the books at a value in excess of its actual cash value when received? ..... In excess of the par value of the stock paid therefor? .....

If the answer to either of the last two questions is "yes," submit a statement showing (a) kind of property, (b) when acquired, (c) par value of the stock paid therefor, (d) actual cash value of the property when paid in, (e) the basis on which that value was determined, (f) value at which the property is entered on the corporation's books, and (g) amount by which such value exceeds the allowable value under Section 326(a) (2) of the Revenue Act of 1918. Enter this amount as Item 2, Schedule G, for the taxable period.

G3. Was the business reincorporated, reorganized, or consolidated or was its ownership changed or was there a change in ownership of property after March 3, 1917? .....
If so, answer the following questions:

(a) Did an interest of 50 per cent or more in the business or in the property which changed ownership remain in the control of the same persons, corporations, associations, or partnerships, or of any of them? .....

(b) Were any of the assets entered on the books of the corporation making this return at a higher value than on the books of its predecessor? .....

(c) If such previous owner was not a corporation, attach a statement showing (1) the cost of acquisition to the previous owner of any asset so transferred or received, (2) ex-

penditures subsequent to that date for betterment or development not deducted as expense or otherwise since March 1, 1913, by such previous owner, (3) the allowance for depreciation, depletion, or impairment since the date of acquisition by such previous owner.

(d) If all, or substantially all, of the property was acquired from a corporation during the taxable period, attach hereto balance sheets of such predecessor corporations as at the beginning of the taxable period and as at the date immediately prior to the transfer of the property to the corporation making the return, and also a balance sheet or statement of the corporation making this return showing the values at which such property received or transferred were entered on the books.

For the purpose of determining invested capital each asset so transferred shall not be allowed a greater value than would have been allowed to the previous owner, if a corporation; or, if not a corporation, at its cost to such previous owner, with proper adjustments for losses and improvements.

G4. Is any property (including physical property, securities, and intangible property) paid for with cash or with other tangible property entered on the books of the corporation at a value in excess of the amount of cash paid therefor or the actual cash value of the tangible property paid therefor? ..... If so, submit a statement showing (a) kind of property, (b) amount of cash paid therefor, (c) actual cash value of other tangible property paid therefor, (d) how that value was determined, (e) value at which the property is entered on the books of the corporation, and (f) excess of (e) over (b) or (c). This excess must be entered as Item 4, Schedule G, for the taxable period.

G5. Has adequate provision been made in the accounts of the company for (a) losses of every kind? ....., (b) depreciation? ....., (c) obsolescence? ....., (d) depletion of mineral deposits, timber supplies, and the like? .....

If adequate charge has not been made for depreciation, depletion, obsolescence, and other losses, and the value of the property has not been maintained by replacements that have been charged to expense, proper additional charges therefor must be computed for all years in which they were not made on the books, and the total amount of such charges must be entered as Item 5, Schedule G.

G6. Did the corporation ever receive a stock dividend on

stock owned in another corporation? ..... If the answer is "yes," state in detail for each stock dividend received, (a) date received, (b) from whom received (c) number of shares received, (d) par value of shares received, (e) value at which entered on its books of account, (f) whether or not surplus was increased by this value. If answer is "yes," enter the amount by which surplus was increased as Item 6, Schedule G. If answer is "no," state the account in which it was included, (g) date of sale of any of the shares of stock received as a stock dividend, (h) number of shares sold, (i) amount received therefor.

Note.—If answers to the foregoing questions indicate that stock dividends received at any time have been treated as an increase of surplus, and such increase is reflected in the computation of invested capital in returns for any or all of the taxable periods 1917, 1918, and 1919, amended returns should be filed for such taxable period or periods in which this error occurred.

Item.	Amount.
1. Valuation of patents, copyrights, secret processes, or formulae, good will, trade-marks, trade brands, franchises, or other intangible property.....	$.....
2. Valuation of tangible property paid in for stock..	.....
3. Valuation of assets acquired in reorganizations..	.....
4. Appreciation	.....
5. Depreciation, depletion, and other losses.....	.....
6. Stock dividend on stock held in another corporation	.....
7. Total Deduction	$.....

Schedule H.—Changes in Invested Capital During Taxable Period.

1. Changes in invested capital during the taxable period ordinarily arise in one or more of the following ways:

Additions—

(a) By sale of capital stock for cash or by the issue of capital stock for tangible or other assets.

(b) By payment of assessments by stockholders or by creation of paid-in surplus by contribution of stockholders.

Deductions—

(c) By liquidation of part of the capital by retirement of stock or by purchase of treasury stock not out of current earnings.

(d) By payment of cash dividends out of earnings of prior years.

(e) By payment of Federal income and profits taxes for previous years.

The changes with respect to taxes will occur in nearly every case. Should no changes be noted, the reason for the omission should be stated.

2. The following instructions should be followed in making the above adjustments; each item should be designated as an addition or deduction, deduction being designated by red ink:

(a) If stock is issued for cash, the actual cash received (but not the amount of discount) should be entered in this schedule. Assets (other than cash) paid in for stock must be valued in accordance with Section 326(a) (2) of the Revenue Act of 1918.

(c) If capital stock of the corporation is reacquired but not paid for out of current profits, the cost of such stock should be deducted from invested capital.

(d) Report dividends paid out of profits of prior years but not dividends paid out of profits of the taxable period. Any distribution made during the first 60 days of the taxable period shall be deemed to have been made from earnings or profits accumulated during the preceding taxable period; but any distribution made during the remainder of the taxable period shall be deemed to have been made from the profits for that period to the extent that such profits are sufficient. (See Articles 857 and 1549, Regulations 45.)

(e) The amount of Federal income and profits taxes payable should be prorated and deducted as of the dates when due and payable whether reserves have been set up on the books or not. (See Article 845.)

The average adjusted deduction to be entered in column 7 equals total income and profits tax multiplied by 0.4214.

3. The data called for in columns 1 to 5 should be given for all transactions, except that columns 3 and 4 are applicable only to the issue or reacquisition of the corporation's stock.

4. In column 6 enter the number of days remaining in the taxable period (including the date of change).

5. The net changes not reported in Schedule L, if not in accordance with the increases or decreases reflected in the balance sheets, should be fully reconciled therewith.

	1. Nature of additions and deductions.	2. Date.	3. Number of shares sold or acquired.	4. If for cash, state price per share.	5. Amount of cash or cash value actually received or paid out.	6. Number of days effective.	7. Adjusted average. (Column 5 × Column 6) No. days in taxable period.
1				$	$		$
2							
3							
4							
5							
6							
7							
8							
9. Net Increase or Decrease							$

Schedule J.—Inadmissible Assets.

Has the corporation any inadmissible assets (i. e., stocks, bonds, and other obligations, except obligations of the United States, the income from which is not taxable)? .....

If so, attach hereto a statement showing for the taxable period the facts called for in items (a) to (f) of this schedule.

If the income from such assets consists in part of gain or profit from the sale or other disposition thereof, or if all or part of the interest derived from such assets is in effect included in the net income because of the limitation on the deduction of interest under Section 234(a) (2) of the Revenue Act of 1918, then a corresponding part of the capital invested in such assets is deemed an admissible asset. In such case set forth in detail—

(a) the various kinds of income derived from such assets and the computation of the part of the capital invested therein which is deemed an admissible asset.

For the purpose of this schedule inadmissible assets shall be valued at cost of acquisition, except that if the corporation is a dealer in securities and inventories such assets in accordance with Article 1585, Regulations 45, such inventory figure shall constitute the measure of value. Admissible assets shall be valued as provided in Sections 326, 330, and 331 of the Revenue Act of 1918 and Articles 831-869, 931-934, and 941 of Regulations 45. The average amount of assets of each

kind held during any year may ordinarily be determined by dividing by 2 the sum of the amount of such assets held at the beginning of the taxable period and the amount held at the end of the taxable period. In such case the amount of admissible assets may best be determined from (1) the balance sheet as at the beginning of the period adjusted with respect to the items in Schedules F and G and (2) the balance sheet as at the end of the period correspondingly adjusted. But if at any time during the taxable period a substantial change has taken place in the amount of such assets, the average amount must be determined as provided in Article 852 of Regulations 45. In such case show in detail—

(b) The computation of such amount;

(c) Amount of inadmissible assets held at beginning of the taxable period;

(d) Amount of inadmissible assets held at end of taxable period;

(e) Average amount of inadmissible assets held during taxable period;

(f) Amount of admissible assets held at beginning of taxable period;

(g) Amount of admissible assets held at the end of taxable period;

(h) Average amount of admissible assets held during taxable period;

(i) Sum of (e) plus (h);

(j) Percentage which (e) is of (i).

This percentage (g) should be applied to the amount appearing on line 7, Schedule B, in order to obtain the deduction on account of inadmissible assets, which should be entered on line 8, Schedule B.

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Questions.

Kind of Business.

1. By means of the key letters given below, identify the corporation's main income-producing activity with one of the general classes, and follow this by a special description of the business sufficient to give the information called for under each general class.

A.—Agriculture and related industries, including fishing, logging, ice harvesting, etc., including the leasing of such property. State the product or products. B.—Mining and quarrying, including gas and oil wells. Include the leasing of such property. State the product or products. C.—Manu-

facturing. State the product and also the material if not implied by the name of the product. D.—Construction—excavations, buildings, bridges, railroads, ships, etc., also equipping and installing same with systems, devices, or machinery, without their manufacture. State nature of structures built, materials used, or kind of installations. E1.—Transportation—rail, water, local, etc. State the kind and special product transported, if any. E2.—Public utilities—gas (natural, coal, or water); electric light or power (hydro or steam generated); heating (steam or hot water); telephone; waterworks or power. E3.—Storage—without trading or profit from sales—(elevators, warehouses, stockyards, etc.) State product stored. E4.—Leasing transportation or utilities. State kind of property. F.—Trading in goods bought and not produced by the trading concern. State manner of trade, whether wholesale, retail, or commission, and product handled. Sales with storage with profit primarily, from sales. G.—Service—domestic, including hotels, restaurants, etc.; amusements; other professional, personal, or technical service. State the service. H.—Finance, including banking, real estate, insurance. I.—Concerns not falling in above classes (a) because of combining several of them with no predominant business, or (b) for other reasons.

2. Concerns whose business involves activity falling in two or more of the above general classes, where the same product is concerned, should report business as identified with but one of the above general classes; for example, concerns in A or B which also transport and market their own product exclusively or mainly, should still be identified with classes A or B; concerns in C (manufacturing) which own or control their source of material supply in A or B and which also transport, sell, or install their own product exclusively or mainly, should be identified with manufacturing; concerns in D may control or own source of supply of materials used exclusively or mainly in their constructive work; concerns in E1 or E2 may own or control the source of their material or power; concerns in F may transport or store their own merchandise, but its production would identify them with A, B, or C.

3. Answers:

(a) General class (use key letter designation) .....

(b) Main income-producing business (give specifically the information called for under each key letter, also whether acting as principal, or as agent on commission; state if inactive or in liquidation) .....

.....

.....

Other Concerns in Same Business.

4. Enter on the following lines the names and addresses of five representative concerns in your locality or section of the country engaged in the same kind of business:

.....

.....

.....

.....

.....

Incorporation.

5. Date of incorporation .....

6. Under the laws of what State or country .....

Reorganization and Acquisition of Mixed Aggregates of Assets.

7. Has the corporation, or any of its predecessors, been reorganized, or has it, or any of its predecessors, taken over a going business or acquired a mixed aggregate of tangible and intangible property, and paid for such property in whole or in part with stock or other securities since the close of the preceding taxable period? .....

8. If so, furnish a brief narrative history of the business and submit a statement showing:

(a) The name of the concern taken over (or from which the property was acquired);

(b) The nature of the assets and liabilities so acquired;

(c) The total par value of the stock issued therefor;

(d) The value at which each class of assets was carried on the books of the concern from which acquired (submit a balance sheet of the predecessor concern as at the date of acquisition or as at the close of its last accounting period prior thereto);

(e) The value at which each item was carried on the books of the corporation making this return, and full details of any adjustments subsequently made pertaining thereto and the basis on which such revaluation was made.

9. If patents, copyrights, secret processes or formulae, good will, trade-marks, trade brands, franchises, or other intangible property were acquired, state the basis on which their value was determined and how they were paid for.

10. If at the time of any purchase or reorganization as

contemplated in question 7, any property was entered on the books of the reorganized concern or any vendee predecessor at a value in excess of that at which it was carried on the books of the vendor concern, state the basis on which the revaluation was made.

Affiliations With Other Corporations (to be Answered by Every Corporation).

11. Does the corporation own directly or control through closely affiliated interests or by a nominee or nominees over 50 per cent of the outstanding voting capital stock of another corporation or of other corporations? .....

12. Is over 50 per cent of your outstanding voting capital stock owned by another corporation or by two or more corporations that are affiliated? .....

13. Is over 50 per cent of your outstanding voting capital stock as well as over 50 per cent of the outstanding voting capital stock of another corporation or of other corporations owned or controlled by the same individual or partnership or by the same individuals or partnerships? .....

14. If the answer to questions 11, 12, and 13, or to any of them, is "yes," answer the following:

(a) Did the corporation file Affiliated Corporations Questionnaire, Form 819, for 1917 or subsequent taxable years? Answer "Yes" or "No" ..... If the answer to this question is "yes," a questionnaire is not required, except under the circumstances described in question (b). If the answer to this question is "no," and the answer to questions 11, 12, and 13, or to any of them, is "yes," procure from the Collector of Internal Revenue for your district Form 819, which shall be filled out and filed as a part of this return. If the answer to this question is "no," question (b) need not be answered.

(b) Did substantially the same conditions, as are set out in the questionnaire filed for 1919 or prior years, obtain during the entire taxable period 1920? Answer "Yes" or "No" ..... If the answer to this question is "no," a statement, setting forth the particulars in which the situation has changed, should be attached to and made a part of this return. If there have been substantial changes in stockholdings, a complete schedule of such changes should be submitted in the form prescribed in Tables 3 and 6 of the questionnaire. If there are companies other than those covered by the questionnaire for 1919 or prior years which, applying the tests contained in questions 11, 12, or 13, may have come

into the affiliated group since 1919, a questionnaire, Form 819, is required for the entire group for the taxable period.

Valuation of Capital Stock.

15. What was the fair value of the total capital stock of the corporation as determined in the last assessment, if any, of the capital stock tax? $..... Date of that assessment .....

Predecessor Business.

16. Did the corporation file a return under the same name for the preceding taxable period? Answer "Yes" or "No" ..... If not, was the corporation in any way an outgrowth, result, continuation, or reorganization of a business or businesses in existence during this or the preceding taxable period? Answer "Yes" or "No" ..... If answer is "yes," give name and address of each predecessor business.

.....

.....

Basis of Return.

17. Is this return made on the basis of actual receipts and disbursements? ..... If not, describe fully what other basis or method was used in computing net income

.....

.....

Government Contracts.

18. Have any adjustments been made during the taxable period on account of contract or contracts with the Government or its agencies or in any Government contract or contracts from which the corporation derived income directly or indirectly, through the operations of a claim board or otherwise? Answer "Yes" or "No" ..... If so, state the amounts involved $.....; whether or not such amounts are included in this return .....; and, if not, was an amended return, accounting for the additional income, filed for the taxable period in which the contract was terminated? ..... Submit a schedule showing full particulars of the contract, date entered into, date the work ceased under said contract or contracts, and the amount and nature of the adjustment.

Amortization.

19. Has amortization been claimed? Answer "Yes" or "No" _____. If so, state for what year _____ Amount $_____.

Preparation of Returns.

20. Did the corporation employ anyone especially to prepare or advise in the preparation of this return Answer "Yes" or "No" _____. If so, give name and address and state to what extent such assistance or advice was received _____.

List of Attached Schedules.

Enter below a list of all schedules accompanying this return, giving for each a brief title and the schedule number.

_____

_____

Schedule K.—Balance Sheets.

Attach hereto balance sheets as of the beginning and end of the taxable period (preferably in parallel columns), showing as nearly as practicable the details called for below. (These balance sheets should be prepared from the books and should be in agreement therewith, or any differences should be reconciled, and if this is a consolidated return, balance sheets should be furnished in accordance with paragraph 8 of page 1 of Instructions.)

Assets.

Cash (including cash in bank and on hand, certificates of deposit, etc.).
Trade accounts (before deducting reserves for losses).
Notes receivable from customers.
Other accounts and notes receivable (to be classified),
Inventories:
- Raw materials.
- Work in progress.
- Finished products.
- Supplies.

Investments:
- Bonds—
  - U. S. bonds and obligations (each issue to be stated separately).
  - Exempt (municipal, State, etc.).
  - Other.

Stock of corporations—
Foreign.
Domestic.
Loans and advances:
To officers and employees.
To others.
Deferred charges to future operations (to be detailed).
Fixed assets:
Land.
Buildings.
Machinery.
Tools and minor equipment.
Delivery equipment.
Office furniture.
Other (state character).
Total.
Less reserves for depreciation (show separately amount applicable to each fixed asset).*
Net Value.
Patents, good will, and other intangible assets:
Paid for in cash or other tangible property.
Paid for in stock (other than stock dividends).
Created by stock dividend or otherwise.
Discount:
On bonds.
On stock.
Total.

Liabilities.

Notes payable:
To officers and stockholders.
To others (including bank loans).
Accounts payable:
Trade.
Other.
Accrued expenses and reserves, the charges creating which are allowable deductions from income (to be detailed).
Reserves, the charges creating which are not allowable deductions from income:
Reserves for losses on notes and accounts receivable.
Other reserves (to be detailed).
Capital stock outstanding (to be classified).
Surplus and undivided profits.
Total.

*Reserves for depreciation may be deducted from the respective asset accounts or itemized on the liability side of the balance sheet.

All corporations engaged in an interstate and intrastate trade or business and reporting to the Interstate Commerce Commission and to any national, State, municipal, or other public officer, may submit in lieu of above Form copies of their balance sheets prescribed by said Commission or State and municipal authorities, as at the beginning and end of the taxable period.

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Schedule L.—Reconciliation of Net Income and Analysis of Changes in Surplus.

1. Net income from Schedule A, Item 27 ..... $
2. Nontaxable income:
   - (a) Interest on obligations of the United States and its possessions wholly exempt..
   - (b) Interest on obligations of States, Territories, and political subdivisions thereof..
   - (c) Interest on Farm Loan Bonds issued under Federal Farm Loan Act.....
   - (d) Dividends on stock of domestic corporations and from foreign corporations taxable by the United States on their net incomes.....
   - (e) Dividends on stock of personal service corporations out of earnings upon which a Federal income tax has been imposed .....
   - (f) Profits which are derived from the sale of vessels and which are exempt under Section 23 of the Merchant Marine Act of 1920.....
   - (g) Other items of nontaxable income (to be detailed):
     - (1) .....
     - (2) .....
     - (3) .....
3. Charges against reserves for bad

debts, contingencies, etc. (to be detailed):

(a) .....
(b) .....
(c) .....

4. Total of Items 1 to 3, inclusive... $
5. Total from Item 13.....
6. Net profit for year as shown by books, before any adjustments are made therein (Item 4 minus Item 5) ..... $
7. Surplus and undivided profits as shown by balance sheet at close of preceding taxable period.....
8. Other credits to surplus (to be detailed):

(a) .....
(b) .....
(c) .....

9. Total of Items 6 to 8, inclusive... $
10. Total from Item 16.....
11. Surplus and undivided profits as shown by balance sheet at close of taxable period (Item 9 minus Item 10) ..... $
12. Unallowable deductions:
    (a) Donations, gratuities, and contributions ..... $
    (b) Income and profits taxes paid to the United States, its possessions, or foreign countries .....
    (c) Special improvement taxes tending to increase the value of the property assessed...
    (d) State, county, and municipal taxes paid by banks, and other corporations based on the value of their capital stock.....
    (e) Furniture and fixtures, additions, or betterments

treated as expenses on the books . . . . . .
(f) Replacement and renewals. .
(g) Insurance premiums paid on the life of any officer or employee for the benefit of the corporation or business. . . .
(h) Interest on indebtedness incurred or continued to purchase or carry securities (other than obligations of the United States issued after September 24, 1917), the interest upon which is wholly exempt from taxation . . . . . .
(i) Additions to sinking fund reserve, and reserves for bad debts and other contingencies (to be detailed):
(1) . . . . . .
(2) . . . . . .
(3) . . . . . .
(j) Other unallowable deductions (to be detailed):
(1) . . . . . .
(2) . . . . . .
(3) . . . . . .

13. Total of Item 12. . . . . $

14. Dividends paid during the taxable period (state whether paid in cash, stock of this company, or other property):
(a) Date paid ..... Character ..... $
(b) Date paid ..... Character .....
(c) Date paid ..... Character .....
(d) Date paid ..... Character .....

15. Other debits to surplus (to be detailed):
(a) . . . . . .
(b) . . . . . .
(c) . . . . . .

16. Total of Items 14 and 15. . . . . $

Schedules Supporting Schedule A.

The following schedules must be furnished, and those prepared on separate sheets should be firmly attached to this return. Enter name and address of corporation on each sheet.

Schedule A2: Cost of Goods Sold, Exclusive of Expenses, Repairs, and Other Items Called for Separately.

If engaged in a trade or business in which the production, purchase, or sale of merchandise of any kind is an income-producing factor, (a) secure from the Collector of Internal Revenue and file as a part of this return, Certificate of Inventory, Form 1126, and (b) fill in the following schedule, entering on lines 3 and 5, immediately before the amount column, the letters "C," or "C or M," to indicate that inventories are valued at either cost, or cost or market, whichever is lower.

(1)	Merchandise bought for sale.....	$.....
(2)	Cost of manufacturing or otherwise producing goods. (Submit schedule showing principal items of cost, the minor items being grouped in one amount).....	.....
(3)	Plus inventory at beginning of year.....	.....
(4)	Total	$.....
(5)	Less inventory at end of year.....	.....
(6)	Cost of goods sold.....	$.....

Schedule A3: Gross Income from Operations Other Than Trading or Manufacturing.

Submit a schedule showing the nature and amount of the principal items included herein, the minor items being grouped in one amount. (For insurance companies see page 2 of Instructions, paragraphs 2 and 3.)

Schedule 4A: Taxable Interest on Obligations of the United States and War Finance Corporation Bonds.

If interest was derived during the taxable period from Liberty Bonds or other obligations of the United States issued since September 1, 1917 (except Victory Liberty Loan 3¾% Notes), or War Finance Corporation Bonds, secure from the Collector and file as a part of this return Schedule of Taxable Interest on Liberty Bonds, Form 1125.

State the amount of Victory Liberty Loan 3¾% and 4¾%

Notes originally subscribed for and still owned at the date of filing this return, $.....

State the amount of Fourth Liberty Loan 4¼% Bonds originally subscribed for and still owned at the date of filing this return, $.....

If this is a consolidated return, file Form 1125, and answer the above questions for each of the corporations composing the affiliated group which owned during the taxable period taxable obligations of the United States and War Finance Corporation Bonds, as each affiliated corporation is entitled to the exemptions.

Schedule A5: Taxable Interest from All Other Sources.

Submit a schedule showing the source, nature, and amount of the principal items included herein, the minor items being grouped in one amount.

(1) Have you included in this item any interest on preferred stock? ..... If so, how much? .....

(2) Have you included in this item any Federal income tax paid at source in pursuance of tax-free covenant bonds? ..... If so, how much? .....

For interest on foreign bonds submit a schedule showing (a) name of country, (b) kind of obligations (whether national, State, municipal, or corporate), (c) amount of principal, and (d) amount of interest.

Schedule A9: Dividends on Stock of Foreign Corporations.

Submit a schedule showing (1) with respect to each foreign corporation taxable by the United States on its net income, (a) name of corporation, (b) country in which organized, (c) total par value of stock owned, and (d) amount of dividends; (2) same information with respect to each foreign corporation not taxable by the United States on its net income.

Schedule A10; Gross Income from All Other Sources (not including any amount with respect to sale of capital assets or miscellaneous investments).

Submit a schedule showing the source, nature, and amount of the principal items included herein, the minor items being grouped in one amount. The total of the schedule should be entered as Item 10, Schedule A.

Schedule A12: Ordinary and Necessary Expenses (except amounts called for separately in Schedule A).

Submit a statement showing character and amount of the principal items included herein, the minor items being

grouped in one amount. (For schedules to be submitted by insurance companies see page 2 of Instructions, paragraph 4 to 7.)

Schedule A13: Compensation of Officers.

Submit a schedule showing for each officer (1) name, (2) duties, (3) time devoted to such duties, (4) shares of stock owned or controlled: (a) preferred, (b) common; (5) total compensation for the taxable period, and (6) amount of, and reason for increase, if any, over preceding period.

Submit a schedule showing for each employee (if a stockholder of the corporation), whose compensation is at the rate of $3,000 or more per annum, facts similar to those called for in respect to officers.

Schedule A14: Repairs (including labor, supplies, overhead, and other items properly chargeable to repairs).

Submit a schedule showing the nature and amount of the principal items included herein, the minor items being grouped in one amount. (For classification of repairs see page 2 of Instructions, paragraph 8.)

Schedule A16: Taxes.

Submit a schedule showing separately for each class of taxes deducted, (a) character, and (b) amount.

Federal income and profits taxes, taxes which are a credit under Section 238, taxes assessed against local benefits of a kind tending to increase the value of the property assessed, and State, county, and municipal taxes paid by banks and other corporations based on the value of their capital stock are not allowable deductions in computing taxable income of such corporations. (See Article 566, Regulations, 45, and Section 234(a)(3) of the Revenue Act of 1918.

Schedule A17: Debts Ascertained to Be Worthless and Charged Off Within Taxable Period.

Submit a schedule showing the amount (a) arising from sales, or services previously reported as income; (b) arising from other sources (interest, rent, royalties, etc.) previously reported as income; (c) arising from sources other than those specified above (to be itemized). (See Article 151, Regulations 45.)

Schedule A18: Exhaustion, Wear and Tear (including obsolescence).

If a deduction is made on account of depreciation, the fol-

lowing schedule must be filled in, and the total amount claimed therein should correspond with the figures reflected in the balance sheet. Land values must not be included in this schedule. (See page 2 of Instructions, paragraph 10, and Articles 161 to 171, Regulations 45.)

Kind of property (If buildings, state the material of which constructed)	Date acquired	Age when acquired	Cost, or if acquired prior to Mar. 1, 1913 the fair market value on that date	Probable life after acquirement	Amount of depreciation charged off: This year	Amount of depreciation charged off: Previous years
			$		$	$
Total			$		$	$

Note.—If obsolescence is a factor in determining your deduction attach a statement showing the amount claimed for the taxable period and the basis on which computed.

Schedule A19: Depletion.

If a deduction is claimed on account of depletion, secure from the collector Form D (minerals), Form E (coal), Form F (miscellaneous nonmetals), Form O (oil and gas), or Form T (timber), fill in and file with return. If complete valuation data has been filed with questionnaire in previous years, then file with this return information necessary to bring your depletion schedule up to date, setting forth in full statement of all transactions bearing on deductions or additions to value of physical assets with explanation of how depletion deduction for taxable period has been determined. In case of timber this should be done by filling in Form T (timber).

Schedule A22: Profit or Loss on Sales of Capital Assets and Miscellaneous Investments (including liquidating dividends).

In case of disposal of property, resulting in a profit or loss, the following schedule must be filled in, using a separate line for each asset.

1. Kind of property	2. Date acquired	3. Age when acquired	4. Cost, or if acquired prior to Mar. 1, 1913, the fair market value on that date	5. Cost of subsequent iments, if any	6. Depreciation	7. Sale price or liquidating dividends
			$	$	$	$
Total			$	$	$	$

Net profit or loss (total of columns 6 and 7 minus total of columns 4 and 5), $.....

State what amount, if any, included in column 4, represents good will, $.....

If any of the assets were acquired prior to March 1, 1913, state how the fair market value on that date was determined .....

In case of exchange of property, submit evidence substantiating the basis used in arriving at the market value of property received .....

Schedule A23: Losses Sustained During the Taxable Period and Not Compensated for by Insurance or Otherwise.

A schedule similar to the one requested above should be submitted with respect to losses of property arising from fires, storms, shipwreck, or other casualty, or from theft, and not compensated for by insurance or otherwise, except that column 7 should show "insurance and salvage" instead of "Sale price or liquidating dividends."

Schedule A26: Amortization of War Facilities.

The amount claimed as a deduction under this item should be substantiated by schedule prepared in accordance with Section 214(a) 9, Revenue Act of 1918, Articles 181 to 188, inclusive, of Regulations 45.

Discount and Premium on Bonds Sold.

There must be attached to the return a schedule showing in detail each issue and sale of bonds of the reporting corporation giving the following information: (a) Class; (b) date of sale; (c) maturity; (d) amount sold; (e) amount realized; (f) premium or discount per annum.

That proportion of the premium or discount applicable to the return period must be reported either as Item 10 or 15, Schedule A, page 1, unless the amount of premiums or discount has been reported as income or allowed as a deduction in prior years. (See Article 544, Regulations 45.)

We, the undersigned, president and treasurer of the corporation for which this return is made, being severally duly sworn, each for himself deposes and says that this return, including the accompanying schedules and statements, has been examined by him and is, to the best of his knowledge and belief, a true and complete return made in good faith, for the

taxable period as stated, pursuant to the Revenue Act of 1918 and the Regulations issued under authority thereof.

.....

President.

.....

Treasurer.

Sworn to and subscribed before me this ..... day of ....., 1921.

Seal of officer making affidavit .....

.....

(Official capacity)

114 Page 1 of Instructions

General Instructions.

Corporation Return.

Returns.

Liability for Filing.

1. Corporations generally.—Every domestic or resident corporation, joint-stock company, association, and insurance company not specifically exempted by Section 231 of the Revenue Act of 1918, and having a net income for the taxable period of $3,000 or more, is subject to excess profits tax and must file a complete return on this form.

2. A corporation, joint-stock company, association, or insurance company (not exempted by Section 231), whether or not having any net income, must file a return on this form, filing in Items 5 to 15 of Schedule D and all the schedules called for on pages 1 and 4, and answering all questions on page 3.

3. Government Contracts.—In addition thereto, if net income in excess of $10,000 was derived during the taxable period from a Government contract, Form 1120S should be secured from the Collector of Internal Revenue for your district and filed as a part of this return.

4. Merchant Marine Corporations.—A corporation owning vessels operated in foreign trade which claims the deduction provided by the first paragraph of Section 23 of the Merchant Marine Act of 1920 should secure from the Collector of Internal Revenue and file as a part of this return Form 1120M.

5. Foreign Corporations.—A foreign corporation subject to the law, regardless of the amount of its net income, is required to file a return with the collector in whose district is located its principal office or agency through which is transacted the business in the United States. If it has no office or

agency in the United States, the return should be filed with the Collector of Internal Revenue, Baltimore, Maryland.

The gross income to be returned includes only the gross income from sources within the United States, including interest on bonds, notes, or other interest-bearing obligations of residents, corporate or otherwise, and all amounts received representing profits on the manufacture and disposition of goods within the United States. (See Articles 91, 93, 550, and 625 of Regulations 45.) For deductions from gross income see Article 573.

6. A foreign corporation should fill in and submit all the schedules called for on pages 1 and 4 of the return with respect to its income from sources within the United States, and should compute its income tax (Schedule D), claiming, however, no specific exemption (Item 9). Inasmuch as the profits tax in the case of a foreign corporation is not based on invested capital, the schedules pertaining thereto should not be filled in. (See Article 871, Regulations 45.)

7. Partnerships and Personal Service Corporations.—Partnerships and personal service corporations must file a return on Form 1065. (See Article 624, Regulations 45.)

Consolidated Returns.

8. The parent or principal reporting company of affiliated corporations as defined in Section 240 of the Act and Articles 631 to 638 of the Regulations, must file a consolidated return on this form with the collector of the district in which its principal office is located and attach thereto a schedule showing the names and addresses of all affiliated corporations in the group, and if the tax is apportioned among these corporations, the amount allocated to each. (See paragraph 9, below.) Each of the other affiliated corporations shall file in the office of the Collector of its district Form 1122.

Consolidated invested capital must be computed as at the beginning of the taxable period of the parent or principal reporting company and consolidated income must be computed on the basis of its taxable period.

All supplementary and supporting schedules should be prepared in columnar form, one column being provided for each corporation included in the consolidation, one column for a total of like items before adjustments are made, one column for intercompany eliminations and adjustments, and one column for a total of like items after giving effect to the eliminations and adjustments. The items included in the column for eliminations and adjustments should be symbolized so as

to readily identify contra items affected, and if necessary, in order to give a correct understanding of these entries, suitable explanations should be appended.

9. If one domestic corporation owns 95 per cent or more of the outstanding voting stock of another, or if 95 per cent or more of the outstanding voting stock of two or more domestic corporations is owned by the same individual or individuals, partnership or partnerships, in substantially the same proportion, a consolidated return must be filed by such corporations, except that the limitations as to consolidation provided by Article 635 must be observed. If the ownership is less than 95 per cent of the outstanding voting stock, but exceeds 50 per cent, the parent or principal corporation of any group of affiliated corporations must furnish the information called for in questions 11 to 14, page 3.

10. The Department prefers that the entire tax shown on a consolidated return be paid by the parent or principal reporting corporation, instead of being apportioned among the corporations composing the affiliated group.

If apportionment is made, each subsidiary or affiliated corporation should state on its Form 1122 the amount of income and profits taxes to be assessed against it for the taxable period.

Period Covered.

11. The taxable period is the calendar year or the fiscal period ended in such calendar year, and the net income shall be computed upon the basis of the corporation's annual accounting period (calendar year or fiscal period) in accordance with the method of keeping the books. The accounting period established for the taxable year immediately preceding must be adhered to unless permission was received from the Commissioner to make a change.

12. If a corporation changes its accounting period, it shall as soon as possible give to the collector for transmission to the Commissioner written notice of such change and of its reasons therefor. The Commissioner will not approve a change of the basis of computing net income unless such notice is given at a time which is both (a) at least thirty days before the due date of the corporation's return on the basis of its existing taxable year, and (b) at least thirty days before the due date of its separate return for the period between the close of the existing taxable year and the date designated as the close of the proposed taxable year. The due date of the separate return for such period is the fifteenth

day of the third month following the close of that period. If the change in the basis of computing the net income of the taxpayer is approved by the Commissioner, the taxpayer shall thereafter make his returns upon the basis of the new accounting period in accordance with the requirements of Section 226 of the Statute and his net income shall be computed as therein provided. See Articles 26 and 431, Regulations 45, and Section 226, Revenue Act of 1918.

Time and Place for Filing.

13. The return must be sent to the Collector of Internal Revenue for the district in which the corporation's principal office is located, so as to reach the collector's office on or before the fifteenth day of the third month following the close of the taxable period, unless an extension of time has been granted.

14. In case of failure to file return within the prescribed time the collector is authorized to grant an extension of not more than thirty days, provided such failure was due to absence or sickness, and provided an application for such extension is made in writing prior to the expiration of the period for which an extension may be granted. In meritorious cases the Commissioner is authorized to grant a further extension.

Signatures and Verification.

15. The return shall be sworn to by the president, vice president, or other principal officer and by the treasurer or assistant treasurer. The return of a foreign corporation having an agent in the United States shall be sworn to by such agent. If receivers, trustees in bankruptcy, or assignees are operating the property or business of the corporation, such receivers, trustees, or assignees shall execute the return for such corporation, under oath.

Payment of Taxes.

16. The tax should be paid by sending or bringing with the return a check or money order drawn to the order of "Collector of Internal Revenue at (insert name of city and State)."

17. Do not send cash through the mail or pay it in person except at the office of the collector.

18. The total tax may be paid at the time of filing the return or in four equal installments, as follows:

The first installment shall be paid at the time fixed by law

for filing the return, and the second installment shall be paid on the fifteenth day of the third month, the third installment on the fifteenth day of the sixth month, and the fourth installment on the fifteenth day of the ninth month after the time fixed by law for filing the return.

Penalties.

For Making False or Fraudulent Return.

19. Not exceeding $10,000 or not exceeding one year's imprisonment, or both, in the discretion of the court, and, in addition, 50 per cent of the tax evaded.

For Failing to Make Return on Time.

20. Not more than $1,000, and, in addition, 25 per cent of the amount of total tax.

For Failing to Pay Tax When Due or Understatement of Tax; Through Negligence.

21. Five per cent of the tax due but unpaid plus interest at the rate of 1 per cent per month during the period in which it remains unpaid.

Working Papers.

22. Every corporation should preserve, available for inspection by a revenue officer, working papers showing—

(a) The balance in each account on the corporation's books that was used in preparing Schedule A.

(b) The amount deducted from each such balance on account of each class of nontaxable income, unallowable deductions, and other adjustments indicated in Schedule L, with a reference to the number of the item in Schedule L in which each amount so deducted was included.

(c) The remainder of each such balance, analyzed to show the amount included in each item of Schedule A, with a reference to the number of the item in Schedule A in which each such amount was included.

Information at the Source.

23. Every corporation making payments of salaries, wages, interest, rent, commissions, or other fixed or determinable income of $1,000 or more during the calendar year, to any individual or partnership, is required to make a true and accurate return to the Commissioner of Internal Revenue, showing the nature and source of such payments and the name and address of the recipient. Forms 1096 and 1099,

for reporting such information, will be furnished by any collector of internal revenue. Such returns of information covering the calendar year 1920 must be forwarded to the Commissioner of Internal Revenue, Sorting Section, Washington, D. C., in time to be received not later than March 15, 1921.

Regulations 45.

24. Copies of Regulations 45 may be obtained from the Collector of Internal Revenue for your district.

115 Page 2 of Instructions

Instructions Regarding Determination of Credits, Computation of Tax, Etc.

Regulations Covering Gross Income and Deductions.

1. Railroad corporations, banks, insurance companies, and other corporations required to submit statements of income and expenses to any national, State, municipal, or other public officer may submit instead of Schedule A a statement of income and expenses in the form in which submitted to such officer. In such cases the taxable net income will be reconciled by means of Schedule L with the net profit shown by the income and expense statement submitted, and should be entered as Item 27, Schedule A, page 1.

2. Life insurance companies should enter as Item 3, Schedule A, the total premiums received from policyholders less such portion thereof as has been paid back or credited to, or treated as an abatement of premiums of, such policyholders within the taxable period. (See Articles 548 and 549 of Regulations 45.)

3. Mutual marine insurance companies should report as Item 3, Schedule A, the gross premiums collected and received by them less amounts paid for reinsurance.

4. Insurance companies should state separately in Schedule A12, (*a*) the net addition required by law to be made made within the taxable period to reserve funds (including including in the case of assessment insurance companies the actual deposit of sums with State or Territorial officers pursuant to law as additions to guarantee or reserve funds; and (*b*) the total of sums other than dividends paid within the year on policy and annuity contracts.

5. Corporations issuing policies covering life, health, and accident insurance combined in one policy issued on the weekly premium payment plan continuing for life and not subject to cancellation should report in Schedule A12 such part of the net addition (not required by law) made within

the taxable period to reserve funds as the Commissioner finds to be required for the protection of the holders of such policies.

6. Mutual marine insurance companies should report in Schedule A12 amounts repaid to policyholders on account of premiums previously paid by them and interest paid upon such amounts between the ascertainment and the payment thereof.

7. Mutual insurance companies (other than mutual life and mutual marine insurance companies) that require their members to make premium deposits to provide for losses and expenses, should report in Schedule A12 the amount of premium deposits returned to their policyholders and the amount of premium deposits retained for the payment of losses, expenses, and reinsurance reserves (unless deducted elsewhere in Schedule A).

8. Incidental repair, which do not add to the value or appreciably prolong the life of property, are deductible as expenses (Item 14, Schedule A). Expenditures for new buildings, machinery, equipment, or for permanent improvement or betterments which increase the value of the property are chargeable to capital account. Expenditures for restoring or replacing property are not deductible under this or any other item of the return. Such expenditures are chargeable to capital account or to depreciation reserve, depending on the treatment of depreciation on the books of the taxpayer.

9. The amount of interest deductible under Item 15, Schedule A, is the amount of interest paid within the taxable period on its indebtedness, except on indebtedness incurred or continued to purchase or carry obligations or securities (other than obligations of the United States issued after September 24, 1917), the interest upon which is wholly exempt from taxation, or, in the case of a foreign corporation, the proportion of such interest which the amount of its gross income from sources within the United States bears to the amount of its gross income from all sources within and without the United States. (See Section 234(a) (2) of the Revenue Act of 1918.)

10. Exhaustion, wear and tear (including obsolescence). —The amounts deductible on account of depreciation is an amount charged off which fairly measures the loss during the year in the value of physical property by reason of exhaustion, wear, tear, and obsolescence. Such an amount should be determined upon the basis of the cost of the property or, if acquired prior to March 1, 1913, the fair market value on

that date and the probable number of years constituting its useful life. The capital sums to be replaced should be charged off over the probable life of the property either in equal annual installments or in accordance with any other recognized trade practice, such as an apportionment of the capital sum over units of production. Whatever plan or method of apportionment is adopted must be reasonable and should be described in the return. Stocks, bonds, and like securities are not subject to exhaustion, wear, and tear within the meaning of the law.

Provisions Affecting Invested Capital and Credits.

Returns for Part of a Year.

11. If this return is for a period less than a full year, Item 3, Schedule C; Item 1, column 2, Schedule D; and Item 9, Schedule D, shall be reduced to as many twelfths of the figures for a full year as there are months in the period for which the return is made.

If the period for which the first or final return is made includes fractions of months, there shall be added to the number of complete months as many thirtieths of a month as there are days in the fractional parts of months.

Credit For Income and Profits Taxes Paid During Taxable Period to Foreign Countries Or Possessions of the United States.

12. If a credit is claimed in Item 13, Schedule D, a copy of Form 1118, completely filled out and sworn to or affirmed, must be submitted with this return. If credit is sought for taxes already paid, the form must have attached to it the receipt for each such tax payment. If credit is sought for taxes accrued, the form must have attached to it the return on which each such accrued tax was based. (See Article 611 of Regulations 45.)

13. When a credit is claimed for taxes accrued, the Commissioner may, as a condition precedent to the allowance of this credit, require the corporation to give a bond (Form 1119), with sureties satisfactory to and to be approved by him in such penal sum as he may require, conditioned for the payment by the taxpayer of any amount of taxes found due if the taxes when paid differ from the amount claimed in respect thereof.

Provisions Affecting Computation of Excess Profits Tax.

14. Item 3, Schedule D, is the excess profits tax unless the

taxpayer is subject to one or more of the following provisions:

(a) Limitations on total tax.—The maximum excess tax imposed shall in no case be more than 20 per cent of the net income in excess of $3,000 and not in excess of $20,000 plus 40 per cent of the net income in excess of $20,000 (Section 302), unless net income amounting to more than $10,000 was derived from a Government contract, when the tax on such income shall be assessed under Section 301(c), in which case the maximum excess and war profits tax imposed upon this proportion of the net income shall not be more than 30 per cent of the amount of net income in excess of $3,000 and not in excess of $20,000 plus 80 per cent of the amount of net income in excess of $20,000. (See Section 302.)

(b) Tax on profits from sale of mineral deposits.—In the case of a bona fide sale of mines, oil or gas wells, or any interest therein, where the principal value of the property has been demonstrated by prospecting or exploration and discovery work done by the taxpayer, the portion of the excess profits tax attributable to such sale shall not exceed 20 per cent of the selling price of such property or interest. (See Articles 971 and 972 of Regulations 45, and Section 337 of the Act.)

The first step is to find the excess profits tax computed without regard to this provision; the second is to find of the tax thus computed such portion as the net income from the sale bears to the total net income. If this portion equals or does not exceed 20 per cent of the selling price, then no adjustment is permitted. Should such portion exceed 20 per cent of the selling price, then, first, find such portion of the excess profits tax as the net income not attributable to the sale bears to the total net income; and secondly, add to this 20 per cent of the selling price of mineral deposits.

(c) Tax on corporation engaged in mining of gold.—If a corporation is engaged in the mining of gold, its excess profits tax shall be that proportion of Item 3, Schedule D, which the net income not derived from the mining of gold bears to the total net income. (Articles 752 and 753, Regulations 45, Section 304(c) of the Act.)

(d) Tax on corporations owning vessels operated in foreign trade.—If a corporation owning vessels operated in foreign trade claims the deduction provided by the first paragraph of Section 23 of the Merchant Marine Act of 1920, Form 1120M must be filed. The profits tax to be paid will

be computed in Schedule D, Form 1120, on the net income reported in Item 29, Schedule A, but the income tax will be computed on the net income reported in Item 27, Schedule A.

(e) Tax of corporation whose income is derived in part from "Personal Service."—If part of the net income (not less than 30 per cent) is derived from a separate trade or business of the character of "personal service," the tax shall be computed in accordance with the provisions of Articles 741 to 743, Regulations 45, Section 303 of the Act.

15. Statement of basis of claims.—If the corporation claims the benefit of one or more of these provisions, it should attach to the return a complete statement of the basis for such claim and a computation of the tax payable in the event that such claim is allowed. The amount of tax so computed should be entered in Schedule D, but, except in cases falling under (a) above, the taxpayer must nevertheless fill in all the schedules of this form.

Special Cases.

16. Definition of special cases.—Section 327 of the Act provides that in the following cases the tax shall be determined as provided in Section 328:

(a) Where the Commissioner is unable to determine the invested capital as provided in Section 326.

(b) In the case of a foreign corporation.

(c) Where a mixed aggregate of tangible property and intangible property has been paid in for stock or for stock and bonds and the Commissioner is unable satisfactorily to determine the respective values of the several classes of property at the time of payment, or to distinguish the classes of property paid in for stock and for bonds, respectively.

(d) Where, upon application by the corporation, the Commissioner finds and declares of record that the tax if determined without benefit of this section would, owing to abnormal conditions affecting the capital or income of the corporation, work upon the corporation an exceptional hardship evidenced by gross disproportion between the tax computed without benefit of this section and the tax computed by reference to the representative corporations specified in Section 328. This subdivision shall not apply to any case: (1) In which the tax (computed without benefit of this section) is high merely because the corporation earned within the taxable period a high rate of profits upon a normal invested capital, nor (2) in which 50 per centum or more of the gross income of the corporation for the taxable period (computed

under Section 233 of Title II) consisted of gains, profits, commissions, or other income derived on a cost-plus basis from a Government contract or contracts made between April 6, 1917, and November 11, 1918, both dates inclusive.

17. Treatment of special cases.—In the cases specified in Section 327 the tax will be specially determined under the provisions of Section 328. A corporation which comes within the provisions of subdivision (d) of Section 327 (paragraph 16, above) may make application for assessment under the provisions of Section 328, which application shall be attached to its return in the form of a statement setting forth in full: (a) The reasons why the tax should be so determined; (b) the facts upon which such reasons are based; (c) an exact description of each trade or business or important branch of a trade or business carried on by it; (d) a statement of the invested capital and net income for each year since the beginning of the prewar period; and (e) a statement showing the amount of gains, profits, commissions, or other income derived on a cost-plus basis from Government contracts made after April 5, 1917, and before November 12, 1918, and showing the per cent which such income is of the total income of the corporation. (See Article 901.)

18. Returns in special cases.—Corporations other than foreign corporations making claim for assessment under Section 328 of the Act should answer all questions and file all schedules as far as possible and attach a statement explaining why it is impracticable to fill out the entire return.

Undistributed Profits Taxable to Stockholders.

19. If any corporation, however created or organized, is formed or availed of for the purpose of preventing the imposition of the surtax upon its stockholders or members through the medium of permitting its gains or profits to accumulate instead of being divided or distributed, such corporation shall not be subject to the tax imposed by Section 230 of the Revenue Act of 1918, but the stockholders or members thereof shall be subject to taxation under Title II in the same manner as in the case of stockholders of a personal service corporation, except that the tax imposed by Title III of the Revenue Act of 1918 shall be deducted from the net income of the corporation before the proportionate share of each stockholder or member is computed. (Section 220 of the Revenue Act of 1918 and Article 351 of Regulations 45.)

117 (Caption)

Filed Sept. 24, 193

RESPONDENT'S OBJECTIONS AND PROPOSED AMENDMENTS TO PETITIONER'S STATEMENT OF THE EVIDENCE.

Filed Sept. 24, 1932.

(To avoid confusion The Newport Company will hereinafter be referred to as the petitioner, and the Commissioner as the respondent, as they appeared in the proceeding before the Board.)

118 2. Strike out the opening statement of counsel for The Newport Company beginning on page 1.

The statement does not purport to be anything more than a statement by petitioner's counsel of his understanding of the issues in the case to be tried by the Board. The first paragraph limits the issues tendered by the petition to the statute of limitations. The rest of the statement quoted in the proposed statement of the evidence is merely explanatory of the issues and was obviously not intended as an admission of any fact in the case. The purpose of an opening statement is to explain the issues and indicate to the extent that counsel may desire what he expects to prove. It is of no importance that he may indicate what he expects to prove in the form of a statement of the facts. From the office and purpose of an opening statement it is assumed that any statement of the facts is merely a statement of what it is expected the evidence will show and is not intended as evidence or as an admission of the facts stated unless it is so stated.

The rules for review (Special Rule II) provides for a statement of the evidence material to the assignments of error. It is only when facts are stipulated by counsel or admissions are made for the obvious purpose of dispensing with formal proof of the facts to which they relate that statements made by counsel may be regarded as evidence in a case.

119 The rule is accurately and comprehensively stated by Van Devanter, Circuit Judge (now on the Supreme Court) in *Horseshoe Mining Co.* v. *Miners Ore Sampling Co.*, (C. C. A. 8th Cir.) 147 Fed. 517 as follows:

"And particularly are his declarations, statements and admissions in respect of his principal's business inadmissible against his principal unless it is specially shown that they

were authorized or that they were made in the due and orderly conduct of the case for the distinct purpose of dispensing with formal proof of the facts to which they relate." (p. 518

The reason for this rule is obvious. Counsel is not presumed to have any personal knowledge of the facts. He must get his information as to the facts of the case from what he is told by his client or by the witnesses who are to testify. He may easily be mistaken in his recollection of them or understanding of what he was told. As said in *Miller v. U. S.* (C. C. A. 8th Cir.) 133 Fed. 337, 349:

"The parties who make the communications may not have correctly expressed their meaning. They may have been misunderstood. A slight alteration of the words without any design of intentional misrepresentation may have entirely varied the effect of their saying or writing. The repetition of such communications should never be received unless it appears with reasonable clearness that it is a correct statement of what the parties to be charged said or wrote."

120 There is nothing in the quoted statement of counsel to indicate that it was intended to dispense with proof of the facts. On the contrary, in connection with his statements regarding Mr. Kupperian's connection with the case (the only statements that were in the form of a statement of facts) it was expressly stated that Mr. Kupperian would appear as a witness. (Tr. 4) He did appear as a witness and testified to the facts which were materially different from counsel's understanding of them at the time of his opening statement. Counsel stated:

"Then the next waiver that was called for I believe was in December, 1923. At that time the tax matters generally were in the hands of the accounting department of the Newport Chemical Works at the head of which was Mr. Kupperian who will appear as a witness." (Tr. 4)

In answer to a question by Mr. Johnston, he testified:

"I have never been connected with the Newport Chemical Works.

Q. Never were?

A. Never were and had nothing to do with it." (Tr. 58)

121 He was on the stand repeatedly and the only testimony brought out as to his connection with tax matters of either The Newport Company or the Newport Chemical Works was the following:

"I originally came to the Newport Company as an accountant and I continued in that capacity until sometime in 1921 when I was made, as I recall it now, assistant comptroller. I continued as assistant comptrolled until I think about May, 1922, when I was made Auditor. I continued as Auditor from then until about the middle of 1927, when I became Vice President-Auditor and Secretary.

Q. During that time have you been familiar with its tax matters?

A. Since about March, 1921; yes." (Tr. 40, 41)

"Q. What is your business at present?

A. Vice President and Auditor and Secretary of the Newport Company.

Q. Have you had to do with the tax matters of the Newport Company, the Newport Chemical Works and other companies that were formerly affiliated with the Newport Company or the Newport Mining Company?

A. Yes." (Tr. 34, 35)

122 The witness's testimony on the subject naturally supersedes anything said by counsel in his opening statement as to what he was expected to testify to. In the statement as it is made in the proposed statement of the evidence, "At that time the tax matters generally were in the hands of the accounting department at the head of which was Mr. Kupperian who will appear as a witness" which purports to be a quotation from the record, the words, "of the Newport Chemical Works" are omitted which changes the whole character of the statement. As shown above the statement as it appears in the record was, "At that time the tax matters generally were in the hands of the accounting department of the Newport Chemical Works at the head of which was Mr. Kupperian who will appear as a witness."

Mr. Kupperian's testimony as quoted above shows that he never had any connection with the Newport Chemical Works Inc. and as it appeared from the testimony that that company had been dissolved and had gone out of existence at the time referred to by counsel, the statement must be entirely valueless and immaterial as evidence even if it had been intended as evidence in the case. The rule requires that only the material evidence in the case should be certified by the Board for purposes of review.

123 At the end of counsel's statement he stated certain facts that he proposed to admit for the purposes of the case and the Member who heard the case with an evident appreciation of the rule with regard to acceptance of state-

ments by counsel as evidence in the case, took the precaution to ask:

"The Member: Now are to construe your statement as a stipulation to that effect?

Mr. Fawsett: That is the purpose of the statement. That is our understanding with Mr. Lyons, counsel for the government.

The Member: The stipulation will be accepted." (Tr. 7)

It was thus expressly understood as to what facts were intended to be admitted by counsel for the purposes of the case. There is nothing else in the statement that was stated either as evidence or as an admission.

Entered Oct. 27, 1932.

124 * * * (Caption) * * *

ORDER.

The Board having promulgated its findings of fact and opinion in the above entitled proceeding on March 19, 1931 and having entered its decision in such proceedings on March 21, 1931; the respondent having filed on September 18, 1931, a petition for review with the United States Circuit Court of Appeals for the Seventh Circuit; the respondent having filed on September 20, 1932 a praecipe; respondent having filed on August 6, 1932 a proposed "Statement of Evidence" for purposes of certification to the Circuit Court of Appeals; petitioner having filed on September 24, 1932 certain objections to the proposed "Statement of Evidence"; hearing on the settlement of the record having been set for October 5, 1932; and hearing having been duly had upon the settlement of the record on October 5, 1932, at which time the parties agreed to undertake to settle all of the objections of the petitioner between themselves, except the second objection made by petitioner, which was argued at such hearing; now, therefore, the premises considered, it is

Ordered that the petitioner's second objection to the respondent's proposed "Statement of Evidence" be and the same hereby is sustained and it is directed that there be stricken from such proposed "Statement of Evidence" the last five lines on page one, all of page two, and the first thirteen lines on page three. (See memorandum attached.)

(Signed) STEPHEN J. MCMAHON
Member.

Dated: Washington, D. C.
October 27, 1932.

125 (Caption)

MEMORANDUM.

At the hearing on this proceeding held on January 21 and 22, 1930, counsel for the petitioner stated (this is the statement which the respondent has included in his proposed "Statement of Evidence" and which is objected to by the petitioner):

* * * * * * *

The only contested issue here will be the question of the statute of limitations. We have agreed with counsel for the Government to admit the facts with reference to the question of transferee of the assets, and there is one minor question involving an accounting matter, which we have also agreed with the Government on. I understand we do agree that we are correct on that item; so that the only issue will be on the question of the statute of limitations.

To state the issue as briefly as possible, the Newport Chemical Works from about the middle of the year 1919, transferred all of its assets to The Newport Company, a corporation organized under the laws of Delaware. The Newport Company issued its stock to the stockholders of the Newport Chemical Works in consideration of that, and assumed all of the liabilities of the Newport Chemical Works. Following that, proceedings were taken to dissolve the Newport
126 Chemical Works, which is the taxpayer in this case, and when those proceedings were consummated it resulted in a dissolution of the company on the 1st of March, 1920. Under the statutes of Maine, the corporation continued in existence for three years after its dissolution for the purpose of winding up its affairs, and so-forth, and thereafter ceased to exist.

This case involves taxes for the year 1917. The Newport Chemical Works filed its income and profits tax return for the year 1917 on the 1st of April, 1918. The five years expired on the 1st of April, 1923. In the meantime, the return which was filed in 1918 had not been audited, and I think the first waiver that the Government called for was in 1920, after the company was dissolved, but of course during the three-year period. That waiver was given sometime in the year 1920.

Then the next waiver that was called for, I believe, was in

December, 1923. At that time, the tax matters generally were in the hands of the accounting department of the Newport Chemical Works, at the head of which was Mr. Kupperian, who will appear as a witness. He was auditor, and he being familiar with the forms of the Government that were sent out, he followed the precedent which had already been made, and had the waiver executed by one of the last officers of the company. That was a man who was a vice-president at the time the company was dissolved, and he knew nothing about the laws of how long the company continued in existence after that. As a matter of fact, when this waiver was executed, the three years had expired, and the company had ceased to exist. The matter was treated in the accounting department as a routine matter, and was not referred to any of the superior officers or board of directors of the company in any way.

A year or two later, another waiver was asked for, or, when the previous waiver was about to expire, another waiver was given in the same form, executed by Mr. H. J. Schlesinger, who was vice-president of the Newport Chemical Works at the time it was dissolved, but who, at the time of the execution of either one of these waivers, had parted
127 with all of his interest in the Newport Company, which was a successor corporation of the Newport Chemical Works. In other words, Mr. Schlesinger, at the time these waivers were executed, and which he signed at the request of Mr. Kupperian in the accounting department of the Newport Company, the Newport Chemical Works had been dissolved, and the three years had expired, and it had ceased entirely to exist as a corporation, and, as I say, at the time of the execution of these waivers, Mr. Schlesinger had parted with all of his interest in the Newport Company, the successor company, and was not then a stockholder or director, and had no connection whatever with The Newport Company. He merely signed these waivers at the request of Mr. Kupperian, because he was one of the officers of the Newport Chemical Works at the time it was dissolved.

* * * * * *

This statement, together with other statements, was made in accordance with the following request by the Member who presided at the hearong:

The Member: May we have the opening statement on behalf of the petitioner, Mr. Fawsett?

Following the statement in question, counsel for petitioner said:

We claim, on that state of facts, that these waivers were entirely void and not binding under the statute. That was the situation when the act of 1926 was passed, and under 1106 the entire liability was extinguished. We claim that, under those conditions, there could be no liability.

The Member: Are you attaching the waivers upon the ground that they were executed by an alleged officer of the corporation, who had no authority to execute them?

128 Mr. Fawsett: I have stated the entire case, as I understand it, your Honor. Of course, we will make out a prima facie case simply by proving when the return was filed, and we assume that the Government will offer these waivers. I am merely stating now what our position in reference to the waivers will be. We shall claim that these waivers are void and ineffectual, because they were not executed with any authority of the taxpaying company, the Newport Chemical Works, and that they were void because the man who executed them was not an officer of the taxpayer company and had no connection, even, with its successor company.

The Member: That answers my question, Mr. Fawsett.

* * * * * * *

It is apparent from the quoted statement, which is in controversy, and what immediately preceded and followed it, that counsel for the petitioner in making such statement was merely stating or outlining what he claimed the proof would show.

There was no proposal or suggestion for a stipulation or admission of fact until what ensued thereafter as follows:

Mr. Lyons: Mr. Fawsett, is it agreed that the net value of the assets which the petitioner took from the taxpayer company is in excess of the tax liability involved in this case?

Mr. Fawsett: Yes, sir. I will state for the record that the petitron concedes, that in the middle of the year 1919 the Newport Chemical Works, Incorporated, the taxpayer in this case, transferred all of its assets to the Newport Company, a corporation which was then presently organized under the laws of Delaware, in consideration of the issuance by the Newport Company of its stock to the stockholders of the Newport Chemical Works, Incorporated, and in connection with that transfer and as part of the consideration, assumed

all of the liabilities of the Newport Chemical Works, Incorporated.

129 We also concede, for the purposes of this case only, that the value of the assets which were so transferred and received by the Newport Company was materially in excess of the amount of the deficiency tax claimed in this case.

The Member: Now, are we to construe your statement as a stipulation to that effect?

Mr. Lyons: That is my understanding, your Honor.

Mr. Fawsett: That is the purpose of the statement. That is our understanding with Mr. Lyons, counsel for the Government.

The Member: The stipulation will be accepted.

* * * * * *

The first request or suggestion for a stipulation was made by Mr. Lyons, counsel for the respondent, as appears from the foregoing quotation.

After counsel for the petitioner had responded thereto with a proposed stipulation, the presiding member elicited from the parties information designed to avoid any misunderstanding as to whether the parties intended to stipulate, and thereupon accepted the stipulation as set forth above. Up to this point everything that was said was considered and treated by the Member as opening statements of what the counsel for the petitioner expected to prove and of what he claimed in his opening statement for the proof he was to adduce thereafter at the hearing.

In making the findings of fact and rendering the opinion thereon nothing that was said in the portion of the open-

130 ing statement, which is stricken by the attached order dated October 27, 1932, was considered or treated as an admission, agreement or stipulation of fact, and no finding or conclusion was based thereon. After eliciting an opening statement from counsel for the petitioner, the Board obviously would not be justified in considering anything stated by counsel in such opening statement as a stipulation, admission, or agreement of fact without any warning or caution to counsel. Reasonable latitude should be allowed and candor should be encouraged in making opening statements. Opening statements are not ordinarily made for the purpose of expressing admissions. A statement by counsel to be of the character of an admission to render it competent as evidence must be a distinct and clear admission made for that express purpose. The statement in question in the instant proceeding was not of such character.

The attached order and this memorandum in support thereof are sustained by or are in harmony with the cases cited by counsel for the petitioner, and are as follows: *Oscanyan* v. *Winchester Repeating Arms,* 103 U. S. 261; *Horseshoe Mining Co.* v. *Miners Sampling Co.,* 147 Fed. 517; *Miller* v. *United States,* 133 Fed. 337; *Mercier* v. *Union St. Railway Co.,* 230 Mass. 397; 119 N. E. 764; *Davidson* v. *Gifford,* 100 N. C. 18, 6 S. E. 718.

Counsel for respondent cites *New York Evening Post* v. *Chaloner,* 265 Fed. 204, certiorari denied 252 U. S. 591; 131 and *Smith* v. *Standard, Sanitary Mfg. Co.,* 254 Fed. 427.

There is nothing in these authorities cited by counsel for respondent which would justify or support a different holding.

In order that there may be no misunderstanding it is pointed out that the term "petitioner" as used herein refers to the Newport Company and the term "respondent" refers to the Commissioner.

(Signed) STEPHEN J. MCMAHON
Member.

132 * * (Caption) * *

Filed Nov. 2, 1932.

EXCEPTIONS AND MOTION TO VACATE

Filed Nov 2-1932.

Comes now the respondent by his attorney, C. M. Charest, General Counsel, Bureau of Internal Revenue, and excepts to the order entered by the United States Board of Tax Appeals dated October 27, 1932, wherein it was "ordered that the petitioner's second objection to the respondent's proposed 'Statement of Evidence' be and the same hereby is sustained * * *", and for grounds of exception says:

Said order is contrary to law for the following reasons:

(1) The statement of counsel for The Newport Company which the respondent has included in his proposed "Statement of Evidence" and which is fully quoted in the "Memorandum" of the Board accompanying and attached to the aforesaid order dated October 27, 1932, contains material concessions and admissions which amount to a norrowing of the issues in the case and the abandonment of all the assignments of error in the Amended Petition filed in June, 1927, and the Amendment to Amended Petition filed in April, 1928,

except the one contained in subparagraph 3 of paragraph IV of the Amended Petition, which is as follows:

133 "3. Because the right of the Commissioner to make such proposed assessment or to enforce the same against the petitioner or said The Newport Chemical Works, Inc., at the time such determination was made was barred by the statute of limitations applicable thereto."

(2) Admissions of facts bearing on the issues in the case made by counsel for The Newport Company in his opening statement, are not only proper to be included in the Statement of Evidence, but are required to be included therein or else there can be no true certification made that such Statement of Evidence contains all of the material evidence in the case.

(3) There is not sufficient ground in fact or in law for the following conclusion of the Member:

"It is apparent from the quoted statement, which is in controversy, and what immediately preceded and followed it that counsel for the petitioner in making such statement was merely stating or outlining what he claimed the proof would show."

Wherefore, it is moved that these exceptions be filed as a part of the record in the cause, and that the aforesaid order of the Board dated October 27, 1932, be vacated and set aside and that the matter quoted in the Board's "Memorandum" attached to said order be included in the Statement of Evidence both as concessions affecting and modifying the issues as presented by the pleadings and admissions of material facts made by counsel for The Newport Company upon the hearing of the proceeding before the United States Board of Tax Appeals.

(Signed) C. M. CHAREST
C. M. Charest,
General Counsel,
Bureau of Internal Revenue.

Of Counsel:
J. R. JOHNSTON,
Special Attorney,
Bureau of Internal Revenue.
JRJ/tm 11-1-32

134 * * (Caption) * * Entered Nov. 9, 1932.

ORDER.

The Board having entered, on October 27, 1932, an order sustaining petitioner's second objection to the proposed "Statement of Evidence" filed by the respondent for purposes of certification to the United States Circuit Court of Appeals for the Seventh Circuit; and respondent having filed with the Board on November 2, 1932 "Exceptions and Motion to Vacate" (the same having been stamped by this Board "filed November 2, 1932"), wherein respondent excepted to such order of the Board entered October 27, 1932, and moved "that these exceptions be filed as a part of the record in the cause, and that the aforesaid Order of the Board dated October 27, 1933, be vacated and set aside and that the matter quoted in the Board's "Memorandum" attached to said order be included in the Statement of Evidence both as concession affecting and modifying the issues as presented by the pleadings and admissions of material facts made by counsel for The Newport Company upon the hearing of the proceeding before the United States Board of Tax Appeals" now, therefore, the matter having been duly considered it is

Ordered that such motion filed by the respondent on November 2, 1932, be and the same hereby is denied. (See Memorandum attached.

Entered Nov-9 1932

Enter

(Signed) STEPHEN J. McMAHON

(Seal) *Member.*

135 * * (Caption) * *

MEMORANDUM.

In the exception filed by the respondent on November 2, 1932, the respondent for the first time raises the question as to whether the statement of counsel for the petitioner, which is the subject matter of petitioner's second objection to the proposed "Statement of Evidence" constituted a narrowing of the issues in the case and the abandonment of all the assignments of error except that relating to the statute of limitations.

There was no attempt made at the hearing to amend the pleadings in this respect. There was no compliance with Rule 18 of the Board's Rules of Practice, which rule is in part as follows:

The petitioner may, as of course, amend his petition at any time before answer is filed. After answer is filed, a petition may be amended only by consent of the Commissioner or on leave of the Board.

* * * * * * *

The Board did not in its disposition of the proceeding consider the statement to which petitioner's second objection relates to be an effort to change the issues as raised by the pleadings, by abandonment or otherwise, nor do we now so consider it. Under the pleadings, there was in fact remaining another issue which the Board was required to pass upon and which the Board did pass upon, namely, the question relating to the constitutionality of section 280.

We consider the statement in question as an opening statement or outline by petitioner of what it claimed the proof would show. Obviously as a part of petitioner's opening statement or outline of what it claimed the proof would show, it was proper to point out the issue to which such proof would be related in order to make the petitioner's position in that respect intelligible.

The record does not disclose that the petitioner has withdrawn or abandoned any part of its second objection to the proposed "Statement of Evidence" as filed by the respondent.

The term "petitioner" as used herein, refers to the Newport Company, and the term "respondent" refers to the Commissioner.

(Signed) STEPHEN J. McMAHON
Member.

(Seal)

Filed Mar. 19, 1931. 24 * * (Caption) * *

Promulgated March 19, 1931.

The taxpayer, a corporation organized under the laws of the State of Maine, engaged in business in Wisconsin, transferred all its assets, the most of which were located in Wisconsin, to the petitioner. Thereafter the courts of Maine decreed that the taxpayer be dissolved. Under the laws of Maine, the taxpayer remained in existence for three years for the purpose of liquidation. After the expiration of the

three year period agreements were executed purporting to waive the statute of limitation with regard to the taxpayer's liability for taxes for a year prior to dissolution. Held, that such waivers are invalid, and that assessment and collection against and from both the taxpayer and the petitioner, as transferee, are barred by the statute of limitation.

Held, upon the evidence, that petitioner is not estopped to deny the validity of the purported waivers.

Charles F. Fawsett, Esq., R. S. Doyle, Esq., and L. A. Manchester, Esq., for the petitioner.

J. R. Johnson, Esq., and J. A. Lyons, Esq., for the respondent.

This is a proceeding for the redetermination of the petitioner's liability, if any, as a transferee of the assets of the Newport Chemical Works, Inc., for the income and profits taxes of that corporation for the calendar year 1917, claimed by the respondent to be due in the amount of $43,527.25. In a letter dated March 14, 1927, the respondent proposed to assess the full amount of $43,527.25 against the petitioner.

In the amended petition it is alleged that the respondent erred in his determination as follows:

(1) In failing to take into account as an offset against such claimed liability claims for refund against the Government to which, as petitioner is informed and believes, it is entitled in an amount sufficient to offset and cancel said sum of $43,527.25, if the petitioner is liable for said sum as a transferee of the assets of said Newport Chemical Works, Inc;

(2) In disallowing as a deduction from taxable income the sum of $15,891.72 as organization expenses on the ground that this amount was deducted by taxpayer from its income in 1917, whereas $11,335.69 of this amount was never deducted by taxpayer from its income, with the result that said sum of $11,335.69 has been erroneously added by the department to the taxpayer's taxable income for the year 1917; and

(3) Because the right of the Commissioner to make such proposed assessment or to enforce the same against the petitioner or said The Newport Chemical Works, Inc., at the time such determination was made was barred by the statute of limitations applicable thereto.

In an amendment to the amended petition the petitioner asserts that section 280 of the Revenue Act of 1926 is in violation of section 1 of Article III of the Constitution of the United States and of Article V of the amendments to the Constitution.

In his amended answer to the amended petition and to the amendment to the amended petition the respondent alleged that though the notice to the petitioner of the determination of its liability for the taxable year 1917 was not mailed until March 14, 1927, the assessment and/or collection thereof from the petitioner as transferee of the assets of
26 the Newport Chemical Works, Inc. is not barred by the statute of limitations for the reason that both the Newport Chemical Works, Inc. and the petitioner as transferee and successor in interest to the Newport Chemical Works, Inc. had, prior to the mailing of the notice of March 14, 1927, each consented in writing, as provided by law, to the making of the assessment and the collection of the taxes involved within the time of the proposed determination, which consent had been accepted in writing by the respondent. The respondent further alleged that the petitioner assured respondent that the waivers which petitioner executed on its own behalf and on behalf of the Newport Chemical Works, Inc. were executed with full authority, and that petitioner is now estopped to deny the validity of the waivers.

At the hearing the respondent admitted that he erred as alleged in assignment of error (2) and the petitioner abandoned the first assignment of error.

FINDINGS OF FACT.

The petitioner is a corporation duly organized, in 1919, under the laws of Delaware with its principal place of business at Carrollville, Wisconsin, and with its post-office address, Box 1582, Milwaukee, Wisconsin.

The Newport Chemical Works, Inc. was a corporation organized under the laws of Maine.

For the taxable year 1917, the Newport Mining Company, a Maine corporation, the Newport Chemical Works, Inc.,
27 and the Dunn Iron Mining Company were affiliated companies. Both the Newport Chemical Works, Inc. and the Newport Mining Company were engaged in business in Wisconsin. The Newport Chemical Works, Inc. originally filed a separate income-tax return, Form 1031, and a separate excess-profits-tax return, Form 1103, with the Collector of Internal Revenue at Milwaukee, Wisconsin, on April 1, 1918. The Newport Mining Company and the Dunn Iron Mining Company filed a consolidated excess-profits-tax return for 1917. At the request of the representatives of the various affiliated companies in the names in which the income and ex-

cess-profits-tax returns were filed, the respondent later determined that the Newport Mining Company, the Dunn Iron Mining Company and the Newport Chemical Works, Inc. were affiliated for the taxable year 1917 for excess-profits-tax purposes only.

In the middle of the year 1919, the Newport Chemical Works, Inc. transferred all its assets to the petitioner in consideration of the issuance by the petitioner of its stock to the stockholders of the Newport Chemical Works, Inc., and in connection with that transfer and as part of the consideration, petitioner assumed all of the liabilities of the Newport Chemical Works, Inc. The value of the assets which were transferred to the petitioner was materially in excess of the amount of the deficiency in tax claimed in this proceeding. A substantial part of the assets of the Newport Chemical Works, Inc. was located in Wisconsin.

28 On March 1, 1920, the Supreme Judicial Court of Maine ordered and decreed that the "Newport Chemical Works, Inc. be dissolved without the appointment of a trustee or receiver." On the same date the same court entered a similar order with regard to the Newport Mining Company. Under date of March 8, 1921, there was filed with the Collector of Internal Revenue at Milwaukee, Wisconsin, the income and profits tax return of the Newport Chemical Works, Inc., for the calendar year 1920, which stated on its face "Not active. Dissolved March 1, 1920. Transacted no business whatsoever during year." It showed no income. The letter from the Newport Chemical Works, Inc. accompanying the return stated:

You will note that the company did not operate during the year and hence no net income earned. You will further note that the company's affairs have been wound up and the company legally dissolved.

On or about April 14, 1920, the petitioner filed with the Collector of Internal Revenue, Milwaukee, Wisconsin, an affiliated corporation questionnaire for the year 1919, which stated that certain companies of the affiliated group, including the Newport Chemical Works, Inc. and the Newport Mining Company, were in the process of dissolution during 1919. This questionnaire stated that the petitioner as principal or parent, the Newport Mining Company, the Newport Chemical Works, Inc. of Maine, and other companies were controlled or owned directly or indirectly by Ferdinand Schlesinger, Mathilda Schlesinger, his wife, Armin A. Schlesinger, his

son, Henry J. Schlesinger, his son, and Gertrude MacLaren, his daughter, and that the Schlesingers personally directed the central organization conducting the business in all its activities.

29 The respondent, by letter dated August 10, 1921, requested certain data in affidavit form in explanation of statements in the affiliated corporation questionnaire for 1919 relating to the dissolution of the corporations. In a letter to the respondent dated August 26, 1921, the petitioner enclosed the affidavit of Frederick R. Wahl, secretary of the petitioner, which stated that the following corporations were dissolved on the following dates:

The Newport Mining Company March 1, 1920
Newport Chemical Works, Inc. (Maine) March 1, 1920
Newport Turpentine & Resin Co. Inc. Oct. 1, 1919
Newport Turpentine & Resin Co. of Florida Sept. 13, 1919
Gogebic Steel Company June 15, 1920

The affidavit further stated that all of the above named corporations were in process of dissolution from and after July 30, 1919.

The respondent in a letter addressed to the petitioner and dated June 17, 1922, advised petitioner what companies should be included in the consolidated returns for the taxable years 1919 and 1920. This letter stated that the Newport Chemical Works, Inc. should be included up to the date of its dissolution, March 1, 1920. In answer to that letter, the petitioner in a letter dated July 27, 1922, advised the respondent that:

Newport Chemical Works, Inc. (Maine) to date of dissolution, March 1st, 1920, has not been included in the return for 1920 for the reason that this Company transacted no business whatsoever during the year. We have however, filed a separate return and forwarded same to the Collector of Internal Revenue, Milwaukee, under date of March 8th, 1921, and mentioned at that time that the company did not operate during the year and no net income was earned.

The following instrument in writing was executed:

30 **Waiver.**

Newport Chemical Works, Incorporated, a corporation organized under the laws of the State of Maine in consideration of the assurance given it by officials of the Income Tax Unit of the Bureau of Internal Revenue that its liability for all Federal taxes imposed by the Act of Congress, approved

September 8, 1916, as amended by the Act of Congress approved October 3, 1917, for the year ended December 31, 1917, on its net income received from all sources in said year, shall not be determined except after deliberate, intensive and thorough consideration, hereby waives any and all statutory limitations as to the time within which assessments based upon such liability may be entered. It is understood, however, that the above corporation does not, by the execution of this waiver, admit in advance the correctness of any assessment which may be made against it for said year by the officials of the Income Tax Unit.

Executed this 15th day of December 1920.

(Signed) NEWPORT CHEMICAL WORKS, INCORPORATED

Corporation

by EDW. G. WILMER

(Title)

Vice-President

Seal

Approved

D. H. BLAIR

A. H. F.

Attest

WILMOT SAEGER

Asst. Secretary.

Date, Dec. 2, 1922

Commissioner of Internal Revenue

The above instrument is stamped "Received Dec. 18, 1920. Natural Resources Sub-Division." It bears the seal of the Newport Chemical Works, Inc., Portland, Maine. The initials under the name "D. H. Blair," are those of A. H. Fay who, on or about December 18, 1920, was head of the Natural Resources Division of the Bureau of Internal Revenue.

The respondent, under date of February 11, 1924, addressed a letter to the Newport Mining Company enclosing form of waivers for the various companies, including the
31 Newport Chemical Works, Inc. This letter stated that the limitation under the statutes for making assessment of income tax for 1917 would expire April 1, 1924, and that because of the limited time for making assessment and collection of any additional tax found due, the Bureau would be unable to give the usual careful consideration without an extension of the period during which assessment might be made.

The following instrument in writing was executed:

.....

(Date)

Income and Profits Tax Waiver.

In pursuance of the provisions of subdivision (d) of Section 250 of the Revenue Act of 1921, Newport Chemical Works, Inc., of Milwaukee, Wisconsin and the Commissioner of Internal Revenue, hereby consent to a determination, assessment, and collection of the amount of income, excess-profits, or war-profits taxes due under any return made by or on behalf of the said corporation for the year 1917 under the Revenue Act of 1921, or under prior income, excess-profits, or war-profits tax Acts, or under Section 38 of the Act entitled "An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes", approved August 5, 1909. This waiver is in effect from the date it is signed by the taxpayer and will remain in effect for a period of one year after the expiration of the statutory period of limitation, or the statutory period of limitation as extended by any waivers already on file with the Bureau, within which assessments of taxes may be made for the year or years mentioned.

NEWPORT CHEMICAL WORKS, INC.
Taxpayer
By H. J. SCHLESINGER (Sgd)
Vice President
(Seal)
D. H. BLAIR (Sgd)
Commissioner
S. A.

32 If this waiver is executed on behalf of a corporation, it must be signed by such officer or officers of the corporation as are empowered under the laws of the State in which the corporation is located to sign for the corporation, in addition to which, the seal, if any, of the corporation must be affixed.

The above document is marked "Received Feb. 26, 1924. E. D. S. ..... Audit Division". It bears the seal of the Newport Chemical Works, Inc., Portland, Maine. The initials "S. A." under the name "D. H. Blair," are those of Sydney Alexander, who at that time was head of the Special Audit Division of the Income Tax Unit.

The following instrument in writing was executed:

December 23, 1924.
(Date)

Income and profits Tax Waiver.

In pursuance of the provisions of existing Internal Revenue Laws, Newport Chemical Works, Inc., a taxpayer, of Milwaukee, Wisconsin, and the Commissioner of Internal Revenue, hereby consent to extend the period prescribed by law for a determination, assessment, and collection of the amount of income, excess-profits, or war-profits taxes due under any return made by or on behalf of said taxpayer for the year 1917 under the Revenue Act of 1924, or under prior income, excess-profits, or war-profits tax Acts, or under Section 38 of the Act entitled "An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes", approved August 5, 1909. This waiver is in effect from the date it is signed by the taxpayer and will remain in effect for a period of one year after the expiration of the statutory period of limitation within which assessments of taxes may be made for the year or years mentioned, or the statutory period of limitation as extended by Section 277(b) of the Revenue Act of 1924, or by any waivers already on file with the Bureau.

NEWPORT CHEMICAL WORKS, INC.
Taxpayer
By H. J. SCHLESINGER (Sgd)
Vice-President.
Seal
D. H. BLAIR (Sgd)
Commissioner
L. T. L.

33 If this waiver is executed on behalf of a corporation, it must be signed by such officer or officers of the corporation as are empowered under the laws of the State in which the corporation is located to sign for the corporation, in addition to which, the seal, if any, of the corporation must be affixed.

The above document bears the stamp "Consolidated Returns Audit Division. Dec. 31, 1924. Asst. Head of Division." It bears the seal of Newport Chemical Works, Inc., Portland, Maine. The initials "L. T. L." beneath the name "D. H. Blair" are those of Louis T. Lohmann, who, in December, 1924, was head of the Consolidated Returns Division of the Bureau of Internal Revenue.

The following instrument in writing was executed:

TREASURY DEPARTMENT

Internal Revenue Service

Form 872 A

Income and Profits Tax Waiver for Taxable Years Ended Prior to January 1, 1922.

January 12th, 1926.

In pursuance of the provisions of existing Internal Revenue Laws Newport Chemical Works, Inc., a taxpayer of Carrollville, Wis., P. O. Box 1582 Milwaukee, Wis., and the Commissioner of Internal Revenue hereby waive the time prescribed by law for making any assessment of the amount of income, excess-profits, or war-profits taxes due under any return made by or on behalf of said taxpayer for the year (or years) 1917 under existing revenue acts, or under prior revenue Acts.

This waiver of the time for making any assessment as aforesaid shall remain in effect until December 31, 1926, and shall then expire except that if a notice of a deficiency in tax is sent to said taxpayer by registered mail before said date and (1) no appeal is filed therefrom with the United States Board of Tax Appeals then said date shall be extended sixty days, or (2) if an appeal is filed with said Board then 34 said date shall be extended by the number of days between the date of mailing of said notice of deficiency and the date of final decision by said Board.

NEWPORT CHEMICAL WORKS, INC.
Taxpayer.
By H. J. SCHLESINGER (Sgd)
Vice-President
D. H. BLAIR (Sgd)
Commissioner
H. B. R.

If this waiver is executed on behalf of a corporation, it must be signed by such officer or officers of the corporation as are empowered under the laws of the State in which the corporation is located to sign for the corporation, in addition to which, the seal, if any, of the corporation must be affixed.

The above document is stamped "Distribution Center. Jan. 20, 1926. Con. Ret. Division". It bears the seal of the Newport Chemical Works, Inc., Portland, Maine. The initials "H. B. R." which appear under the name of D. H.

Blair" are those of H. B. Robinson, who was head of the Review Division of the Income Tax Unit.

The following instrument in writing was executed:

TREASURY DEPARTMENT

Internal Revenue Service

Form 872 (Revised Jan. 1926)

Income and Profits Tax Waiver for Taxable Years Ended Prior to January 1, 1923

IT:CR:G-5
Els
Newport Mining Company, Parent.

November 6, 1926

In pursuance of the provisions of existing Internal Revenue Laws Newport Chemical Works, a taxpayer of Milwaukee, Wisconsin, and the Commissioner of Internal Revenue hereby waive the time prescribed by law for making any assessment of the amount of income, excess-profits, or war-profits taxes due under any return made by or on behalf of said taxpayer for the years 1917 and 1918, period ended June 30, 1919 under existing revenue acts, or under prior revenue acts.

This waiver of the time for making any assessment as aforesaid shall remain in effect until December 31, 1927, and shall then expire except that if a notice of a deficiency in tax is sent to said taxpayer by registered mail before said date and (1) no appeal is filed therefrom with the United States Board of Tax Appeals then said date shall be extended sixty days, or (2) if an appeal is filed with said Board then said date shall be extended by the number of days between the date of mailing of said notice of deficiency and the date of final decision by said Board.

THE NEWPORT COMPANY
Taxpayer
By A. A. SCHLESINGER (Sgd)
President
As successors in Interest to the Newport Chemical Works.

Seal

D. H. BLAIR (Sgd)
Commissioner
A. B. N.

If this waiver is executed on behalf of a corporation, it must be signed by such officer or officers of the corporation as are empowered under the laws of the State in which the corporation is located to sign for the corporation, in addition to which, the seal, if any, of the corporation must be affixed.

The above document bears the stamp "Nov. 10, 1926. Asst. head of Division". It bears the seal of the Newport Company. The initials "A. B. N." appearing under the name of "D. H. Blair" are those of Albert B. Niess, who, on or about November 10, 1926, was assistant head of the Records Division of the Income Tax Unit.

36 The following instrument in writing was executed:

December 11, 1923
(Date)

Reference Symbols I.T:NT:G-EFS-5

Income and Profits Tax Waiver.

In pursuance of the provisions of subdivision (d) of Section 250 of the Revenue Act of 1921, The Newport Mining Company of Maine with its principal office at Milwaukee, Wisconsin, and the Commissioner of Internal Revenue, hereby consent to a determination, assessment, and collection of the amount of income, excess-profits, or war-profits taxes due under any return made by or on behalf of the said company for the year 1917 under the Revenue Act of 1921, or under prior income, excess-profits, or war-profits tax Acts, or under Section 38 of the Act entitled "An Act to provide Revenue, equalize duties, and encourage the industries of the United States, and for other purposes", approved August 5, 1909. This waiver to be effective until March 15, 1925, and applies to said The Newport Mining Company and affiliated companies included in the letter of the department dated August 13, 1923 with reference symbols I.T:NR:G-EFS-5.

THE NEWPORT MINING COMPANY
Taxpayer
By H. J. SCHLESINGER (Sgd)
Vice-President.
D. H. BLAIR (Sgd)
A

It bears the stamp "Received Dec. 15, 1923. Natural Resources Division." It bears no seal. The initial "A" which appears under the name of "D. H. Blair" is that of Sydney

Alexander, who on or about December 15, 1923, was head of the Special Audit Division of the Income Tax Unit.

37 At the date of the dissolution of the Newport Chemical Works, Inc., E. G. Wilmer and H. J. Schlesinger were two of its vice-presidents. A. A. Schlesinger was president at that time. He was also a director of the petitioner at the time of its organization.

In a letter dated March 14, 1927, the respondent informed the petitioner as follows:

As provided in Section 280 of the Revenue Act of 1926, there is proposed for assessment against you the amount of $43,527.25 constituting your liability as a transferee of the assets of the Newport Chemical Works, Milwaukee, Wisconsin, for income and profits taxes in the amount of $43,527.25 due from The Newport Chemical Works for the year 1917 as shown in the attached statement.

* * * * * * *

In a letter addressed to the Newport Mining Company, dated August 13, 1923, relative to the liability of that company and its affiliated companies, the Newport Chemical Works, Inc., and the Dunn Iron Mining Company, notice was given of the respondent's determination of additional taxes against those companies. It contains the statement "Waivers for 1917 are on file in this office."

The Newport Mining Company, by Charles F. Fawsett, its general counsel, in October, 1923, filed an appeal with the respondent in behalf of itself and affiliated companies, from the proposed deficiency determinations as set forth in the respondent's letter of August 13, 1923, and requested redetermination for the year 1917 and prior years. The appeal concludes with the following statement:

This appeal is taken by the Newport Mining Company for and in behalf of each of the subsidiary and affil-
38 iated companies named in said letter of the Department of August 13, 1923, as well as on its own behalf, and it is duly authorized to take such appeal.

(Signed) The Newport Mining Company
By Charles Fawsett
General Counsel

In a letter of December 3, 1924, addressed to Newport Chemical Works, Inc., 1112 First National Bank Building, Milwaukee, Wisconsin, the respondent stated:

Waiver for the year 1917 filed February 26, 1924 expires April 1, 1925.

Thereafter a protest was filed on December 27, 1924, by the Newport Mining Company and the Dunn Iron Mining Company, in which they protested against the determination of the respondent that the Newport Chemical Works, Inc. was not affiliated with the Newport Mining Company. The protest contains the following statement:

The taxpayers hereby place upon record their willingness to file all required waivers to permit of the final determination of the above exceptions before the expiration of any period of limitation provided by law and will forthwith transmit such waivers to be filed in connection herewith as soon as the same can be prepared and properly executed.

Attached to this protest was the following affidavit:

A. A. SCHLESINGER being first duly sworn says that he was during the years 1917 and 1918 the president of the Newport Mining Company and was one of the principal executive officers of the Dunn Iron Mining Company, and as such actively participated in the management of the business and affairs of both said companies during said years and prior thereto. That he was also vice-president and treasurer of the Newport Chemical Works, Incorporated, during said years and was then and ever since has been familiar with the business and affairs of all of said companies,
39 and that he is familiar with the facts stated in the foregoing protests and in connection with the exceptions contained therein, and that he makes this verification for and on behalf of all of said companies and particularly on behalf of the Newport Mining Company and the Dunn Iron Mining Company and that he is duly authorized so to do. That he has read said protests and statements made therein and in connection with the foregoing exceptions and that all of such statements are true to the best of his knowledge, information and belief.

(Signed) A. A. SCHLESINGER.

Under date of December 14, 1925, the respondent wrote a letter to Newport Chemical Works, 1112 First National Bank Building, Milwaukee, Wisconsin, proposing another redetermination for the year 1917. Therein it was stated "1917 waiver filed Dec. 31, 1924 is in effect until April 1, 1926."

Under date of January 8, 1926, a protest made by A. A. Schlesinger, purporting to be made on behalf of Newport Chemical Works, Inc., was filed with the respondent, taking exception to the determination contained in the letter of December 14, 1925. It was claimed that respondent erred in

failing to hold that Newport Chemical Works, Inc. was affiliated with the Newport Mining Company. The protest concludes with the following statement:

The taxpayer hereby places on record its willingness to file all requires waivers to permit of the final determination of the above exceptions before the expiration of any period of limitation provided by law and will forthwith transmit such waivers to be filed in connection herewith as soon as the same can be prepared and properly executed, and in the meantime and pending the receipt of such formal waivers, it agrees that this offer and agreement shall operate and have the full force and effect of such formal waivers in all respects as though the same were filed herewith.

40 The above was verified by A. A. Schlesinger, under oath, as follows:

A. A. SCHLESINGER being first duly sworn says that he was during the year 1917 the vice-president and treasurer of the Newport Chemical Works, Inc., and continued as such until May, 1919, and thereafter was the president of the company until its dissolution in the year 1920.

That prior to the dissolution of said company all of its assets and property was transferred to and taken over by the Newport Company, a corporation organized under the laws of Delaware which in consideration thereof assumed and agreed to pay all of the liabilities of said Newport Chemical Works, Inc. and said Newport Company has even since continued to be the owner of all of such property and assets in so far as the same have been preserved or are still in existence. That this affiant is now president of the Newport Company and is in active charge, management and direction of its affairs.

That he has read the foregoing protest and exceptions and that the same are true to the best of his knowledge, information and belief.

(Signed) A. A. SCHLESINGER

The Newport Mining Company, the Newport Chemical Works, Inc., and their successor, the petitioner, as well as some of the other affiliated companies all maintained offices on the 10th and 11th floors of the First National Bank Building; Milwaukee, Wisconsin. The books of the Newport Chemical Co. Inc. were kept there and its manufacturing plant was located at Carrollville, Wisconsin, which is near Milwaukee.

Opinion.

OPINION.

McMAHON: At the hearing the petitioner abandoned the first assignment of error and the respondent admitted that he erred as alleged in the second assignment of error. The petitioner undertakes to question the constitutionality of section 280 of the Revenue Act of 1926, but having invoked that section to secure a redetermination, it may not question its validity. *Henry Cappellini, et al.*, 14 B. T. A. 1269. See also *Phillips et al.* v. *Commissioner of Internal Revenue*, 42 Fed. (2d) 177.

41 The remaining contention of the petitioner is that assessment and collection of its liability as a transferee of the assets of the Newport Chemical Works, Inc. for income and profit taxes of the latter company for the year 1917 are barred by the statute of limitations. We must first determine if assessment of the tax liability of the Newport Chemical Works, Inc. is barred by the statute of limitations and if so, when such assessment became barred. Section 250 (d) of the Revenue Act of 1921 provides, in part:

> (d) The amount of income, excess-profits, or war-profits, taxes due under any return made under this Act for the taxable year 1921 or succeeding taxable years shall be determined and assessed by the Commissioner within four years after the return was filed, and the amount of any such taxes due under and return made under this Act for prior taxable years or under prior income, excess-profits or war-profits tax Acts, or under section 38 of the Act entitled "An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes," approved August 5, 1909, shall be determined and assessed within five years after the return was filed, unless both the Commissioner and the taxpayer consent in writing to a later determination, assessment, and collection of the tax; and no suit or proceeding for the collection of any such taxes due under this Act or under prior income, excess-profits, or war-profits tax Acts, or of any taxes due under section 38 of such Act of August 5, 1909, shall be begun, after the expiration of five years after the date when such return was filed, but this shall not affect suits or proceedings begun at the time of the passage of this Act: * * *

The evidence discloses that the income and profitas-tax re-

turn of the Newport Chemical Works, Inc. for the year 1917 was filed on April 1, 1918. In the absence of valid waivers, therefore, the time within which assessment and collection of the tax from the Newport Chemical Works, Inc. could have been made expired on April 1, 1923. However, the respondent has introduced into evidence a number of written instruments which purport to be waivers or consents in writing, which he contends extended the time for making assessment and collection against and from that company, and, that hence the
42 assertion on March 14, 1927, of petitioner's liability under section 280 of the Revenue Act of 1926 was timely.

It is the contention of the petitioner that some of these instruments are invalid and of no effect because they were executed by a former officer of the Newport Chemical Works, Inc., after that corporation was dissolved.

The evidence shows that on March 1, 1920, the Supreme Judicial Court of Maine ordered and decreed that the "Newport Chemical Works, Inc., be dissolved without the appointment of a trustee or receiver".

Section 89 of Chapter 51 of the Revised Statutes of Maine, 1916, provides:

> *Bill in equity against corporation for dissolution; if no liabilities, dissolution may be had without trustees.* R. S. c. 47 § 80. Except where otherwise provided by statute, whenever at any meeting of its stockholders, legally called therefor, such stockholders vote to dissolve such corporation, a bill in equity against the same for dissolution thereof, may be filed by any officer, stockholder or creditor in the supreme judicial court, in the county in which it has an established place of business, or in which it held its last stockholders' meeting; upon said bill, such notice shall be given as may be ordered by any justice of said court, in term time or vacation, and upon proof thereof, such proceedings may be had according to the usual course of suits in equity, that said corporation shall be dissolved and terminated. Upon proof that there are no existing liabilities against said corporation, and no existing assets thereof, requiring distribution among the stockholders, said court may dissolve said corporation without the appointment of trustees or receivers.

Section 81 of Chapter 51 of the Revised Statutes of Maine, 1916, provides:

> *Existence after charter expires.* R. S. c. 47 § 77. Corporations, whose charters expire or are otherwise termi-

nated, have a corporate existence for three years thereafter; to prosecute and defend suits, to settle and close their concerns; to dispose of their property; and to divide their capitals.

The existence of a corporation depends upon the law of
43 the State in which it is incorporated.

It therefore appears that under the Statutes of Maine, construed in the most favorable light for the respondent, the Newport Chemical Works, Inc., did not exist after March 1, 1923, for any purpose. See *Oklahoma Natural Gas Co.* v. *Oklahoma*, 273 U. S. 257.

Prior to that date there was executed what purported to be an unlimited waiver by the Newport Chemical Works, Inc. of the statute of limitations applicable to its tax liability for the year 1917, but even if valid, this waiver expired on April 1, 1924, in accordance with Mimeograph 3085, which was issued by the Commissioner of Internal Revenue on April 11, 1923. *Wirt Franklin*, 7 B. T. A. 636. The remainder of the purported waivers were, so far as evidence shows, executed *after the Newport Chemical Works, Inc.*, had ceased to exist. Respondent, nevertheless, contends that they are valid and serve to waive the statute of limitation as to that company.

Counsel for responden cites numerous Wisconsin statutes, including sections 226.02 and 226.12 of the statutes of 1925, and sections 181.02 and 181.03 of the statutes of 1927, but we find no provision in the statutes of Wisconsin which purports to empower the former officers of any dissolved corporation, foreign or domestic, to execute valid waivers of the statute of limitations after three years after its dissolution.

44 The respondent further contends that whether or not the Newport Chemical Works, Inc., was legally dissolved under the laws of Maine, it continued as a *de facto* corporation in Wisconsin where it was doing business and in which State most of its assets were located, and that, therefore, the instruments executed under its seal are valid. The respondent states that since the Newport Chemical Works, Inc. entered into agreements with respondent and held itself out as a corporation, the petitioner is precluded from denying the corporate existence of the Newport Chemical Works, Inc. In our opinion this argument is without merit, for the reason that at no time did the petitioner or anyone else, so far as the record shows, represent that the Newport Chemical Works, Inc., was in existence after its dissolution under the laws of Maine. On the contrary respondent was informed

from time to time that the Newport Chemical Works, Inc. had been dissolved.

We must conclude that the purported consents in writing are ineffective to extend the statutory period for assessment and collection against and from the Newport Chemical Works, Inc.

The respondent contends that the petitioner is estopped to deny the validity of the alleged waivers for the reason that it led respondent to believe that these waivers were executed with full authority. However, the evidence discloses that the petitioner on numerous occasions, prior to the expiration of the statutory period of limitations, informed respondent that the Newport Chemical Works, Inc. had been dissolved. There was, therefore, no deception on the part of the petitioner and petitioner is not estopped to deny the validity of the waivers. *Southwestern Investment Company*, 19 B. T. A. 30.

45 There is no evidence that assessment of 1917 taxes was ever made against the Newport Chemical Works, Inc. After April 1, 1924, assessment and collection of such taxes against and from the Newport Chemical Works, Inc. were barred by the statute of limitations. Therefore since assessment and collection of the liability of the taxpayer were barred prior to the passage of the Revenue Act of 1926, assessment and collection of the liability of the petitioner as transferee are also barred. *Caroline J. Shaw, Executrix*, 21 B. T. A. 400, and *E. N. & O. M. Ennis, et al.*, 21 B. T. A. 406.

Reviewed by the Board.

JUDGMENT WILL BE ENTERED FOR THE PETITIONER.

46 * * (Caption) * *

Entered Mar. 2, 1931.

DECISION.

Pursuant to the determination of the Board, as set forth in its report promulgated March 19, 1931, it is

Ordered and Decided: That the assessment and collection of the deficiency of $43,527.25 for the calendar year 1917 is barred by the statute of limitations.

Enter:

(Signed) STEPHEN J. MCMAHON,
Member.

Entered: March 21, 1931.

56 * * (Caption) * *

NOTICE OF FILING PETITION FOR REVIEW.

Filed Oct. 9, 1931.

To: The New Port Company,
Carrollvile, Wisconsin.

Charles F. Fawsett, Attorney,
Room 928—425 E. Water St.,
Milwaukee, Wisconsin.

You are hereby notified that the Commissioner of Internal Revenue did, on the 17th day of September, 1931, file with the Clerk of the United States Board of Tax Appeals, at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Seventh Circuit, of the decision of the Board heretofore rendered in the above-entitled case. A copy of the petition for review and the assignments of error as filed is hereto attached and served upon you.

Dated this 17th day of September, 1931.

(Signed) C. M. CHAREST,
General Counsel, Bureau of Internal Revenue.

Personal service of the above and foregoing notice, together with a copy of the petition for review and assignments of errors mentioned therein, is hereby acknowledged this 19th day of Sept., 1931.

(Signed) C. C. BRETT,
Respondent on review,
" CHARLES F. FAWSETT,
Attorney for respondent on review.

Filed Sept. 18, 1931. 47 * * (Caption) * *

PETITION FOR REVIEW TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Filed Sept, 18, 1931.

To the Honorable Judges of the Circuit Court of Appeals for the Seventh Circuit:

Comes now David Burnet, Commissioner of Internal Revenue, by his attorneys, G. A. Youngquist, Assistant Attorney

General, C. M. Charest, General Counsel, Bureau of Internal Revenue, and J. R. Johnston, Special Attorney, Bureau of Internal Revenue, and respectfully shows:

I.

The petitioner on review (hereinafter referred to as the Commissioner) is the duly appointed, qualified, and acting Commissioner of Internal Revenue of the United States, appointed and holding his office by virtue of the laws of the United States. The respondent on review is a corporation which at all times material herein had its principal place of business and principal office and agency at Carrolville in the immediate vicinity of Milwaukee, in the State of Wisconsin, and said corporation made its returns of income to the Collector of Internal Revenue at Milwaukee, Wisconsin, all of which is within the jurisdiction of the United States Circuit Court of Appeals for the Seventh Circuit.

48

II.

The matter in controversy involves the liability of The Newport Company, the acknowledged successor in interest to The Newport Chemical Works, Incorporated, (Maine), as a transferee under Section 280 of the Revenue Act of 1926, of the assets and property and of the going business of said The Newport Chemical Works, Incorporated, for a deficiency in income and profits taxes imposed upon the said transferor company for the taxable year 1917, in the amount of $43,527.25, besides interest and penalties.

III.

The Newport Chemical Works, Incorporated, (Maine) filed its income and profits tax return for the calendar year 1917 with the Collector of Internal Revenue, Milwaukee, Wisconsin, on April 1, 1918. The Commissioner thereafter determined that said company was affiliated with The Newport Mining Company and other companies for excess profits tax purposes. On or about July 1, 1919, The Newport Company was organized as a corporation under the laws of the State of Delaware for the purpose of taking over the assets and the going business of The Newport Chemical Works, Incorporated, (Maine) The Newport Mining Company, and other companies, under an agreement of consolidation and merger

whereby it issued its capital stock to the stockholders of The Newport Chemical Works, Incorporated, in place of the stock held by them in said company, and agreed to assume all of the liabilities of said Newport Chemical Works, Incorporated. The Newport Chemical Works, Incorporated, was dissolved in the early part of the year, 1920, but the Commissioner was not notified of its dissolution in any transaction relating to the audit of the 1917 return of The Newport Chemical Works, Incorporated, until some time in the year 1926.

49 The Commissioner, in the year 1923, addressed a letter to The Newport Chemical Works, Incorporated, Milwaukee, Wisconsin, advising of a proposed determination of a deficiency in tax against said company for the year 1917. This letter was received by The Newport Company, successor in interest, which caused certain protests thereafter to be filed in the name of the Newport Chemical Works, Incorporated, and caused certain income and profits tax waivers referred to in the Board's findings of facts, to be executed in the name of The Newport Chemical Works, Incorporated, by the former officers of said company, with the corporate seal of said company affixed to each, which were transmitted and delivered to the Commissioner for the purpose of obtaining further consideration of the matters set forth in the aforesaid protests. By these waivers, and other waivers given January 8, 1926, and November 6, 1926 by The Newport Company as Successor in Interest to The Newport Chemical Works, Incorporated, The Newport Company consented to an extension of time for the assessment and collection of any deficiencies determined as to the said Newport Chemical Works, Incorporated, until December 31, 1927.

The Commissioner determined the aforesaid deficiency in corporation income and profits taxes for the calendar year 1917 in the amount of $43,527.25 and under date of March 14, 1927, and in accordance with the provisions of Section 274 and Section 280 of the Revenue Act of 1926, mailed to The Newport Company, a sixty-day letter in which he proposed to assess the aforesaid liability against said The Newport Company. Thereafter, on or about May 7, 1927, The Newport Company filed a petition with the United States Board of Tax Appeals, and subsequent thereto, on or about June 6, 1927, filed an Amended Petition with said Board of Tax Appeals. By said original and Amended Petitions The Newport Company prayed for a redetermination as to its aforesaid liability

on the single ground (insisted upon at the hearing) that
50 the right of the Commissioner to make an assessment and collection of said liability against the petitioner was barred by the statute of limitations at the time said sixty day letter was mailed to it on said March 14, 1927. Said appeal was heard by the United States Board of Tax Appeals January 21 and 22, 1930. On March 19, 1931, the Board promulgated its findings of fact and opinion, and on March 21, 1931 entered its final order of redetermination in said appeal by which it was Ordered and Decided "that the assessment and collection of the deficiency of $43,527.25 for the calendar year 1917 is barred by the statute of limitations."

IV.

A review of said decision and final order of the Board by the United States Circuit Court of Appeals for the Seventh Circuit is sought herein.

V.

The Commissioner says that manifest errors occurred and intervened to his prejudice in the record and proceedings before the Board of Tax Appeals and in the said decision and final order of redetermination rendered and entered by the Board, and the Commissioner assigns the following errors and each of them which he avers occurred in said record, proceedings, findings of fact, decision and final order of redetermination, upon which he relies for grounds for reversing the said decision and final order of redetermination so rendered and entered by the Board of Tax Appeals, to-wit:

1. The Board of Tax Appeals erred in failing to find that the petitioner, The Newport Company, was the acknowledged successor in interest, through merger and consolidation, of The Newport Chemical Works, Incorporated (Maine), and other companies, which, in carrying out said merger and consolidation, went entirely out of business and ceased to exist and were divested of all assets and property.

51 2. The Board of Tax Appeals erred in failing to find that the petitioner, at all times material herein, was the only entity from which the tax liability of The Newport Chemical Works, Incorporated, expressly assumed by it, could have been collected, or which could have effectually been held liable as the taxpayer.

3. The Board of Tax Appeals erred in failing to find that the petitioner, The Newport Company, received and acted upon all requests for waivers directed to The Newport Chemical Works, Incorporated, referred to in the Board's findings of fact.

4. The Board of Tax Appeals erred in failing to find that The Newport Company, by its representations and conduct, both expressly and impliedly warranted the authority of H. J. Schlesinger and others who signed said waivers; and that the said H. J. Schlesinger and others attached the corporate seal of The Newport Chemical Works, Incorporated, to the waivers aforesaid at the request of said The Newport Company, its officers and agents.

5. The Board of Tax Appeals erred in failing to find that The Newport Company may not now be heard to say and is precluded and estopped from saying that the waivers, referred to in the Board's findings of facts, were executed without authority.

6. The Board of Tax Appeals erred in failing to find that The Newport Company in the transactions with the Commissioner and his representatives relating to the taxable year 1917, and in connection with the giving and acceptance of income and profits tax waivers for the said taxable year 1917, failed to notify the Commissioner of the material facts and circumstances in connection with the dissolution of The Newport Chemical Works, Incorporated (Maine).

52 7. The Board of Tax Appeals erred in failing to find that the Commissioner relied upon each of the waivers referred to in the Board's findings of facts, and that he deferred assessment and collection of the tax in reliance thereon.

8. The Board of Tax Appeals erred in failing to find that The Newport Company availed itself of such extension in time for assessment and collection, and that at all times material herein it both expressly and impliedly warranted the authority of M. J. Schlesinger and others who signed and executed each of said waivers for and in its behalf and for its benefit though the said waivers, given prior to the year 1926 were executed in the name of The Newport Chemical Works, Incorporated.

9. The Board of Tax Appeals erred in finding that a certain affiliated corporations questionnaire and certain affidavits and correspondence with the Commissioner, through the Affiliations Section of the Income Tax Unit with reference to returns of The Newport Mining Company and affiliated

companies and The Newport Company and affiliated companies, relating to the question of affiliation for the taxable years 1919 and 1920, constituted reasonable notice to the Commissioner of the dissolution of The Newport Chemical Works, Incorporated, in connection with the giving and acceptance of waivers of The Newport Chemical Works, Incorporated, for the taxable year 1917.

10. The Board erred in failing to find from the evidence that the Commissioner or his representative did not have actual knowledge of the dissolution of The Newport Chemical Works, Incorporated, or of the contents of the above-stated affiliated corporations questionnaire, correspondence, etc., with reference to the years 1919 and 1920 when the waivers referred to in the Board's findings of fact were accepted.

11. The Board of Tax Appeals erred in finding "that at no time did the petitioner (The Newport Company) or any one else, so far as the record shows, present that The Newport Chemical Works, Incorporated, was in existence
53 after its dissolution under the laws of Maine", and in finding that "on the contrary, respondent (The Commissioner) was informed from time to time that The Newport Chemical Works, Incorporated, had been dissolved."

12. The Board of Tax Appeals erred in finding and determining that the assessment and collection of the aforesaid liability of The Newport Company for the taxes imposed upon The Newport Chemical Works, Incorporated, was barred by the statute of limitations.

13. The Board of Tax Appeals erred as a matter of law in not holding that an informal waiver incorporated in a protest executed and verified under date of January 8, 1926, signed and verified by A. A. Schlesinger, who states therein that he is the president of The Newport Company and is in active charge of its affairs, together with a waiver given by The Newport Company, as Successor in Interest to The Newport Chemical Works, Incorporated, dated November 6, 1926, were sufficient to extend the period of limitations for assessment and collection of the liability of The Newport Company, the successor in interest to The Newport Chemical Works, Incorporated, for the deficiency in tax imposed upon The Newport Chemical Works, Incorporated, for the taxable year 1917.

14. The Board of Tax Appeals erred in not approving the determination of the Commissioner as to the liability of The Newport Company under Section 280 of the Revenue Act of 1926, for the deficiency in taxes determined to have been due from The Newport Chemical Works, Incorporated, for

the taxable year 1917, in the amount shown by the pleadings and the evidence adduced at the hearing.

15. The Board of Tax Appeals erred in not finding all of the material facts established by the evidence and particularly in not finding such material facts as hereinbefore set out.

54 Wherefore, the Commissioner petitions that the decision of the United States Board of Tax Appeals be reviewed by the United States Circuit Court of Appeals for the Seventh Circuit, and that a transcript of the record be prepared in accordance with law and the rules of said Court and be transmitted to the Clerk of said Court for filing, and that appropriate action be taken to the end that the errors complained of may be reviewed and corrected by said Court.

(Sd) G. A. YOUNGQUIST,
G. A. Youngquist,
Assistant Attorney General.

(Signed) O. M. CHAREST
C. M. Charest,
General Counsel, Bureau of Internal Revenue.

(Sd) J. R. JOHNSTON,
J. R. Johnston,
Special Attorney,
Bureau of Internal Revenue.

55 United States of America
District of Columbia } ss.

C. M. CHAREST, being duly sworn, says that he is the General Counsel of the Bureau of Internal Revenue, and as such is duly authorized to verify the above and foregoing petition for review to the United States Circuit Court of Appeals for the Seventh Circuit; that he has read said petition for review and is familiar with the statements therein contained, and that the facts therein stated are true, except such facts as may be stated on information and belief, and those facts he believes to be true.

C. M. CHAREST,
C. M. Charest,
General Counsel, Bureau of Internal Revenue.

Sworn and subscribed to before me this 18 day of September, 1931.

(Sgd) MARCELLETTE M. TAYLOR
Notary Public, District of Columbia.

My commissioner expires March 31, 1935.

JRJ:LS 9/16/31

138 * * (Caption) * * Entered July 11, 1932.

Filed July 11, 1932.

On motion of counsel for petitioner, it is ordered by the Court that the time for filing the transcript of the record of the United States Board of Tax Appeals in this cause, in this Court, be, and the same is hereby extended sixty days from July 7, 1932.

(Signed) SAMUEL ALSCHULER,
(Signed) EVAN A. EVANS,
United States Circuit Judges.

139 * * (Caption) * * Entered Aug. 20, 1932.

Filed Aug. 20, 1932.

Whereas upon the application of the above named petitioner an order was made and entered in the above entitled appeal by one of the judges of this court on the 7th day of July, 1932, extending the time within which to complete and transmit the record of the proceedings in the above case before the United States Board of Tax Appeals for a period of sixty days from the date of said order for purposes of review by this court, and

Whereas it has been stipulated and agreed between the parties to the above entitled proceeding that the time for completing and transmitting the record of said proceedings for the purposes of such review may be further extended until the 15th day of October, 1932, subject to the approval of a judge of this court as provided by Rule 32, V,

On motion of Charles F. Fawsett, Esq., counsel for the respondent,

It Is Hereby Ordered that the time for settling the evidence and filing the transcript of the record before this court, United States Circuit Court of Appeals for the Seventh Circuit, be and the same hereby is further extended until and including the 15th day of October, 1932.

Dated August 16, 1932.

(Signed) GEORGE T. PAGE,
Judge of the United States Circuit Court of Appeals for the Seventh Circuit.

Filed Aug. 22, 1932. 140 * * (Caption) * *

STIPULATION.

Filed Aug. 22, 1932.

Now come the parties to the above-entitled cause, and respectfully ask that the Court enlarge the time within which to file the statement of evidence for the petition on review from September 5th to November 15th, for the reason that counsel for both sides will be absent from the city until October and will not be able to complete the statement of evidence before that time.

(Signed) C. M. CHAREST,
General Counsel, Bureau of Internal Revenue,
Attorney for Petitioner.
(Signed) CHARLES F. FAWSETT,
(Signed) RICHARD S. DOYLE,
Attorneys for Respondent on Review.

August 18th, 1932.
Time extended to Nov. 15th, 1932.

(Signed) EVAN A. EVANS,
Judge.

Entered Nov. 14, 1932. 141 * * (Caption) * *

ORDER ENLARGING TIME.

Counsel for the respondent having, on the 10th day of November, 1932, filed with the United States Board of Tax Appeals, a motion for an extension of time, in which to settle the evidence and transmit the record to the Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, from November 15, 1932, up to and including November 25, 1932; and, at a hearing, held commencing at 2 o'clock P. M., on November 10, 1932, upon the settlement of the statement of evidence, the Member of the Board presiding having proposed to counsel for both parties that the time be extended up to and including December 1, 1932, and counsel for both parties having consented thereto, and for good and sufficient cause appearing of record, now therefore, it is

Ordered that the time for the preparation of the statement of the evidence and transmission and delivery of the record

sur petition for review of the above entitled proceeding in the United States Circuit Court of Appeals for the Seventh Circuit be, and the same is hereby enlarged and extended from November 15, 1932, up to and including December 1, 1932.

(Signed) STEPHEN J. MCMAHON
Member.

Dated: Washington, D. C.
November 14, 1932.

142 * * (Caption) * *

Entered Nov. 29, 1932.

ORDER ENLARGING TIME.

For cause appearing of record, it is

Ordered: That the time for transmission and delivery of the record sur petition for review of the above entitled proceeding in the United States Circuit Coutr of Appeals for the Seventh Circuit, be and it is hereby extended to Dec. 5, 1932.

(Signed) LOGAN MORRIS
Member.

Dated: Washington, D. C,
Nov. 29, 1932.

116 * * (Caption) * *

Filed Sept. 20, 1932.

PRAECIPE FOR RECORD.

Filed Sep. 20, 1932.

To the Clerk of the United States Board of Tax Appeals:

You will please prepare, transmit and deliver to the Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, copies duly certified as correct of the following documents and records in the above-entitled cause in connection with the petition for review by the said Circuit Court of Appeals for the Seventh Circuit, heretofore filed by the Commissioner of Internal Revenue:

1. Docket entries of the proceedings before the Board.
2. Pleadings before the Board.

(a) Amended petition, including annexed copy of deficiency letter.

(b) Amendment to the amended petition.

(c) Amended answer to amended petition and amendment to amended petition.

3. Findings of fact, opinion and decision of the Board.

4. Petition for review, together with proof of service of notice of filing petition for review and of service of a copy of petition for review.

5. Statement of the evidence as settled and allowed.

6. This praecipe.

(Signed) C. M. CHAREST
General Counsel, Bureau of Internal Revenue.

Service of a copy of the within praecipe is hereby admitted this 14 day of September 1932.

(Sgd) CHARLES F. FAWSETT
Attorney for Respondent.

LMB/tm 9-9-32

Filed Nov. 5, 1932.

136 * * (Caption) * *

SUPPLEMENTAL PRAECIPE FOR RECORD.

Filed Nov. 5, 1932.

To The Clerk of The United States Board of Tax Appeals:

In addition to the matter set forth in the original praecipe heretofore filed on September 30, 1930, you will please prepare, transmit and deliver to the Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, a copy duly certified as correct of the following documents and records in the above-entitled cause in connection with the petition for review by the said Circuit Court of Appeals for the Seventh Circuit, which have been filed with the Board of Tax Appeals since the aforesaid original praecipe was filed:

1. The order signed Stephen J. McMahon, Member, dated October 27, 1932, with the full memorandum thereto attached and relating thereto, sustaining the second objection of The Newport Company to a proposed Statement of Evidence filed by the Commissioner of Internal Revenue August 6, 1932.

2. A copy of the second objection of The Newport Company to the aforesaid proposed Statement of Evidence to which the aforesaid order and "Memorandum" relate.

3. "Exceptions and Motion to Vacate" filed by the respondent November 2, 1932, with reference to the aforesaid order of Stephen J. McMahon, Member, dated October 27, 1932, and the memorandum thereto attached.

4. Any and all orders issued by the United States Board of Tax Appeals, or by a Member thereof with reference to the aforesaid Exceptions and Motion to Vacate; and with reference to extension of time within which to settle the evidence and transmit the record to the United States Circuit Court of Appeals, Seventh Circuit.

137 5. This supplemental praecipe.

(Signed) C. M. CHAREST
C. M. Charest
General Counsel Bureau of Internal Revenue.

Service of a copy of the within praecipe is hereby admitted this 4th day of November, 1932.

R. S. DOYLE
Attorney for Respondent.

JRJ/tm 11-2-32

143 UNITED STATES BOARD OF TAX APPEALS

(Cut—U. S. Board of Tax Appeals 1924)

Washington

Commissioner of Internal Revenue,
Petitioner,
v.
The Newport Company,
Respondent.
} Docket No. 28200.

CERTIFICATE.

I, B. D. Gamble, clerk of the U. S. Board of Tax Appeals, do hereby certify that the foregoing pages, 1 to 137, inclusive, contain and are a true copy of the transcript of record, papers, and proceedings on file and of record in my office as called for by the Praecipe in the appeal (or appeals) as above numbered and entitled.

In testimony whereof, I hereunto set my hand and affix the seal of the United States Board of Tax Appeals, at Washington, in the District of Columbia, this 29th day of November, 1932.

(Seal)

B. D. GAMBLE
Clerk, United States Board of Tax Appeals.

At a regular term of the United States Circuit Court of Appeals for the Seventh Circuit begun and held in the United States court room in the city of Chicago in said Seventh Circuit on the fourth day of October 1932, of the October term in the year of our Lord one thousand nine hundred and thirty-two, and of our Independence the one hundred and fifty-seventh.

4896

COMMISSIONER OF INTERNAL REVENUE

vs.

THE NEWPORT COMPANY

Petition for review of decision of the United States Board of Tax Appeals

And on, to wit: On the ninth day of December 1932 there was filed in the office of the clerk of this court an appearance of counsel for petitioner, which said appearance is in the words and figures following, to wit:

United States Circuit Court of Appeals for the Seventh Circuit

No. 4896. October Term, 1932

COMMISSIONER OF INTERNAL REVENUE

vs.

THE NEWPORT COMPANY

The clerk will enter our appearance as counsel for the petitioner.

G. A. YOUNGQUIST,
SEWALL KEY,
Washington, D.C.

Endorsed: Filed Dec. 9, 1932. Frederick G. Campbell, clerk.

And afterwards, to wit: On the ninth day of January 1933 there was filed in the office of the clerk of this court, an appearance of counsel for petitioner, which said appearance is in the words and figures following, to wit:

Case No. 4896

United States Circuit Court of Appeals for the Seventh Circuit

October Term, 1932

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

THE NEWPORT COMPANY, RESPONDENT

The Clerk will enter our appearances as counsel for the petitioner.

C. M. CHAREST,
General Counsel, Bureau of Internal Revenue.
J. R. JOHNSTON,
Special Attorney, Bureau of Internal Revenue.

Endorsed: Filed Jan. 9, 1933. Frederick G. Campbell, clerk.

And afterwards, to wit: On the ninth day of March, 1933, there was filed in the office of the clerk of this court, an appearance of counsel for the petitioner, which said appearance is in the words and figures following, to wit:

Case No. 4896

United States Circuit Court of Appeals for the Seventh Circuit

October Term, 1932

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

THE NEWPORT COMPANY, RESPONDENT

The clerk will enter our appearances as counsel for the petitioner.

SEWALL KEY,
Special Assistant to the Attorney General.
NORMAN D. KEELER,
Special Assistant to the Attorney General.
C. M. CHAREST,
General Counsel, Bureau of Internal Revenue.
J. R. JOHNSTON,
Special Attorney, Bureau of Internal Revenue.

Endorsed: Filed Mar. 9, 1933. Frederick G. Campbell, clerk.

And afterwards, to wit: On the fifteenth day of March, 1933, there was filed in the office of the clerk of this court, an appearance of counsel for respondent, which said appearance is in the words and figures following, to wit:

United States Circuit Court of Appeals for the Seventh Circuit

No. 4896. October Term, 1932

COMMISSIONER OF INTERNAL REVENUE

vs.

THE NEWPORT COMPANY

The clerk will enter my appearance as counsel for the respondent.

RICHARD S. DOYLE,
#832 Shoreham Bldg., Washington, D.C.

Endorsed: Filed Mar. 15, 1933. Frederick G. Campbell, clerk.

And afterwards, to wit: On the eleventh day of April, 1933, the following further proceedings were had and entered of record, to wit: Tuesday, April 11, 1933, court met pursuant to adjournment and was opened by proclamation.

Present: Hon. Samuel Alschuler, Circuit Judge, presiding; Hon. Evan A. Evans, Circuit Judge; Hon. William M. Sparks, Circuit Judge; Hon. Robert C. Baltzell, District Judge; Frederick G. Campbell, clerk; Henry C. W. Laubenheimer, marshal.

Before: Hon. Evan A. Evans, Circuit Judge; Hon. William M. Sparks, Circuit Judge; Hon. Robert C. Baltzell, District Judge.

4896

Commissioner of Internal Revenue

vs.

The Newport Company

Petition for review of decision of the United States Board of Tax Appeals

It is ordered by the court that this cause be, and the same is hereby, set down for hearing on May 3, 1933.

And afterwards, to wit: On the third day of May, 1933, the following further proceedings were had and entered of record, to wit: Wednesday, May 3, 1933, court met pursuant to adjournment and was opened by proclamation.

Present: Hon. Samuel Alschuler, Circuit Judge, presiding; Hon. William M. Sparks, Circuit Judge; Hon. James H. Wilkerson, District Judge; Frederick G. Campbell, clerk; Henry C. W. Laubenheimer, marshal.

4896

Commissioner of Internal Revenue

vs.

The Newport Company

Petition for review of decision of the United States Board of Tax Appeals

Now this day come the parties by their counsel and this cause now comes on to be heard on the printed record and briefs of counsel and on oral arguments by Mr. G. A. Youngquist, counsel for petitioner, and by Mr. Charles F. Fawsett, counsel for respondent, and the court having heard the same, takes this matter under advisement.

In the United States Circuit Court of Appeals, for the Seventh Circuit

No. 4896. October term, 1932, April session, 1933

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

THE NEWPORT COMPANY, RESPONDENT

Petition for review of decision of the United State Board of Tax Appeals

July 8, 1933

Before ALSCHULER and SPARKS, Circuit Judges, and WILKERSON, District Judge.

SPARKS, Circuit Judge: This is a petition to review a decision of the United States Board of Tax Appeals, and involves the liability of respondent as a transferee, under section 280 of the Revenue Act of 1926, ch. 27, 44 Stat. 9, 26 U.S.C.A., sec. 1069 [1], for a deficiency in income and profits taxes for the year 1917, imposed upon the Newport Chemical Works, Inc., which is hereinafter referred to as the Chemical Works. The only question presented is whether the statute of limitations bars the assesment and collection of the tax against respondent as transferee of the Chemical Works.

The findings of the Board disclose the following facts: Respondent was a Delaware corporation with its principal place of business at Carrollville, Wisconsin, and its offices at Milwaukee. The Newport Chemical Works was a Maine corporation having a manufacturing plant at Carrollville and its offices in Milwaukee. For the taxable year 1917 the Newport Mining Company, a Maine corporation doing business in Wisconsin, the Chemical Works, and the Dunn Iron Mining Company were affiliated companies. The Chemical Works originally filed a separate income-tax return on April 1, 1918, showing an income tax liability of $18,405.65, and an excess-profits

[1] "(a) The amounts of the following liabilities shall, * * * be assessed, collected, and paid in the same manner and subject to the same provisions and limitations as in the case of a deficiency in a tax imposed by this chapter * * *.

"(1) The liability, at law or in equity, of a transferee of property of a taxpayer, in respect of the tax * * * imposed upon the taxpayer by this chapter or by any prior income, excess profits, or War-Profits Tax Act. * * *

"(b) The period of limitation for assessment of any such liability of a transferee or fiduciary shall be as follows:

"(1) Within one year after the expiration of the period of limitation for assessment against the taxpayer; * * *

"(c) For the purposes of this section, if the taxpayer is deceased, or in the case of a corporation, has terminated its existence, the period of limitation for assessment against the taxpayer shall be the period that would be in effect had the death or termination of existence not occurred.

"(d) The running of the statute of limitations upon the assessment of the liability of a transferee or fiduciary shall, after the mailing of the notice under section 1048 to the transferee or fiduciary, be suspended for the period during which the Commissioner is prohibited from making the assessment in respect of the liability of the transferee or fiduciary * * * and for 60 days thereafter." * * *

tax liability of $12,892.03. The Newport Mining Company and the Dunn Company filed a consolidated excess-profits tax return for 1917. At the request of the representatives of the affiliated companies, respondent later determined that the Newport Mining Company and the Dunn Company and the Chemical Works were affiliated for the taxable year 1917 for excess-profits tax purposes only.

About the middle of 1919 the Chemical Works transferred all its assets to respondent in consideration of the issuance by respondent of its stock to the stockholders of the Chemical Works, and in turn respondent assumed all the liabilities of the Chemical Works. The value of the assets thus transferred was materially in excess of the amount of the tax herein claimed, and a substantial part of those assets was located in Wisconsin. The Newport Mining Company, the Chemical Works, and their successor, the respondent, and some of the other affiliated companies, maintained offices on the same floors of the same building in Milwaukee, and they were controlled or owned, directly or indirectly, by Ferdinand Schlesinger, his wife, Matilda, his sons, Armin A. and Henry J., and his daughter, Gertrude McLaren. Ferdinand and his two sons above referred to, together with M. T. McLaren and E. G. Wilmer, were directors and officers of the Chemical Works at the time it was dissolved, as hereinafter referred to, and they were also elected as the first board of directors of respondent on July 15, 1919.

It is admitted that the statutory period of limitations for assessment against the Chemical Works expired April 1, 1923, and as against the transferee, April 1, 1924, unless extended by waivers. The deficiency notice was mailed to respondent on March 14, 1927, which was after the statutory period of limitations. Petitioner contends that waivers were filed on behalf of the Chemical Works which extended that statutory period to December 31, 1926, which was after the enactment of the Revenue Act of 1926, and less than one year prior to the deficiency notice.

The instruments relied upon as waivers were all duly received and filed by the Commissioner and are characterized as follows:

(1) Instrument executed December 15, 1920, without time limit, signed in the name of the Chemical Works by Edward G. Wilmer, vice president. By order of the Commissioner on April 11, 1923, all waivers for 1917, unlimited in their terms as to time, expired on April 1, 1924, II-1 C.B. 174; see also *Wirt Franklin* v. *Commissioner*, 7 B.T.A. 636.

(2) Instrument dated December 11, 1923, signed in the name of the Newport Mining Company by H. J. Schlesinger, vice president, purporting to be effective until March 15, 1925, and to apply to the Newport Mining Company and its affiliated companies.

(3) Instrument undated but received by the Department, February 26, 1924, signed in the name of the Chemical Works by H. J. Schlesinger, vice president, purporting to extend the period for

assessment for one year beyond the time provided by statute or by any previous extension on file with the Bureau. Petitioner admits that this waiver did not extend the time for assessment beyond April 1, 1925.

(4) Instrument dated December 23, 1924, signed in the name of the Chemical Works by H. J. Schlesinger as vice president, to be effective to April 1, 1926.

(5) Instrument dated January 12, 1926, signed in the name of the Chemical Works by H. J. Schlesinger as vice president, effective to December 31, 1926. The record discloses that H. J. Schlesinger severed all connection with respondent in the spring of 1922, and had no interest in it thereafter.

(6) Instrument dated January 11, 1926, which purports to be exceptions of the Chemical Works to a tentative determination and deficiency in tax referred to in a letter from the Commissioner dated December 14, 1925. This instrument was not signed, but the facts therein alleged were verified under oath by A. A. Schlesinger. It expressed a willingness and intention to file forthwith all waivers necessary to permit a final determination of the exceptions before the expiration of any period of limitation provided by law, and agreed that the instrument they presented should have the effect of such formal waivers.

(7) Instrument dated November 6, 1926, signed in the name of the respondent, the Newport Company, by A. A. Schlesinger, president, as successor in interest to the Chemical Works, purporting to be a waiver by the Chemical Works of the time for making any assessment against it for 1917 and 1918 and the first half of 1919, to be effective until December 31, 1927.

It is contended by respondent that the waivers upon which petitioner relies were all executed without authority and are insufficient to extend the time for making the assessment beyond the time prescribed by statute. To support this contention it relies upon a decree of the Supreme Judicial Court of Maine, dated March 1, 1920, which purports to dissolve the Chemical Works, without the appointment of a trustee or receiver. The decree recited that the cause was heard on bill and answer and that it appeared that the defendant company had no debts and no assets. The stockholders' bill which constituted the basis of this decree was filed January 20, 1920, under chapter 51 of the Maine Revised Statutes (1916), the substance of the pertinent parts of which are marginally set forth.[2] It alleged that

[2] Section 81 provides that corporations whose charters expire or which are otherwise terminated have a corporate existence for three years thereafter for the purpose of prosecuting or defending suits, settling and closing their concerns, disposing of their property, and dividing their capital.

Section 89 provides that upon a vote of the stockholders to dissolve a corporation, a bill in equity may be filed by any officer, stockholder, or creditor, before the Supreme Judicial Court in the county in which the corporation has an established place of business, or in which it held its last stockholders' meeting; that upon said bill such notice shall be given as ordered by any justice of said court, in term time or vacation, and upon proof thereof, such proceedings may be had according to the usual course of suits in equity, that said corporation shall be dissolved and terminated; and that upon proof that there are no existing liabilities against said corporation, and no existing assets thereof,

there were existing liabilities against said corporation, and no assets requiring distribution among the stockholders. The answer was filed February 13, 1920, and admitted all the averments of the bill. The evidence further discloses that on the date this decree was entered, the same court also entered a decree dissolving the Newport Mining Company.

Petitioner challenges the effect of this decree, contending that it is void for lack of the court's jurisdiction to order dissolution, because the bill and answer allege that there were liabilities; that under such circumstances the court should have appointed a trustee, and for failing to do so the decree is void and may be attacked collaterally. We think there is no merit in this contention. The court had jurisdiction of the parties and the subject matter, and hence it had the power to decide the question then before it, rightly or wrongly. Under petitioner's statement of the facts, the most that can be said is that the court erred in the exercise of its rightful power, and its decision cannot be collaterally attacked. But we are not in accord with petitioner's statement of the facts. While the bill and answer allege the existence of liabilities, and the decree recites that it was heard on the bill and answer, yet it does not necessarily follow that no other evidence was submitted. The decree was entered thirty-nine days after the bill was filed and more than two weeks after the answer was filed, and in those periods of time conditions could have changed. Moreover, the allegations in the pleadings may have been erroneous, and they may have been made for the purpose of having a trustee appointed, yet under such a state of facts the court would not be bound by the allegations but would form its decree in accordance with the facts. The record does not disclose what evidence was introduced, but the court found that neither debts nor assets existed, and we assume that that finding was based on evidence submitted at the hearing, and we shall consider the bill as amended to conform to the facts. While the statute refers to liabilities rather than debts, yet we have no doubt that the Maine court used the word debts in the sense of liabilities, and under the present facts we are not inclined to indulge in nice distinctions in order to defeat that court's jurisdiction. We are convinced that the decree of the Maine court is valid and effective and that the Chemical Works did not exist after March 1, 1923. See *Oklahoma Gas Co.* v. *Oklahoma*, 273 U.S. 257. The only waiver executed prior to that time was numbered one, *supra*, and it expired April 1, 1924, in accordance with the order of the Commissioner of Internal Revenue. The other pur-

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requiring distribution among the stockholders, the court may dissolve said corporation without the appointment of trustees or receivers.

Section 90 provides that the court has jurisdiction in said cause to appoint receivers, issue injunctions, and pass interlocutory decrees and orders, according to the usual course of proceedings in equity; and shall, upon dissolving said corporation, or terminating its charter, appoint one or more trustees who shall have all the powers of similar trustees, but that said court may superintend the collection and distribution of the assets, and may retain the bill for that purpose.

Section 101 provides that corporations, not created for literary, benevolent, or banking purposes, shall not so divide any of their corporate property as to reduce their stock below par value, until all debts are paid, and then only for the purpose of closing their concerns.

ported waivers were executed after the Chemical Works had ceased to exist, and for that reason they have no force or effect.

It is also contended by petitioner that since the Chemical Works held itself out as a corporation, and was so represented by respondent, that fact will preclude respondent from denying its corporate existence. After April 1, 1924, the Chemical Works could not so represent itself, and the Board found as a matter of fact that respondent made no such representations. Petitioner further contends that respondent led petitioner to believe that the waivers were executed with full authority and hence is estopped to deny their validity. On this question of fact the Board found adversely to petitioner's contention. There is substantial evidence in the record to support all findings of fact made by the Board.

Decision

Affirmed.

And afterwards, to wit: On the eighth day of July 1933 there was filed in the office of the clerk of this court, the opinion of the court, which said opinion is in the words and figures following, to wit:

And on the same day, to wit: On the eighth day of July 1933 the following further proceedings were had and entered of record, to wit: Saturday, July 8, 1933, court met pursuant to adjournment and was opened by proclamation.

Present: Hon. Samuel Alschuler, Circuit Judge, presiding; Hon. Evan A. Evans, Circuit Judge; Hon. William M. Sparks, Circuit Judge; Frederick G. Campbell, Clerk; Henry C. W. Laubenheimer, Marshal.

Before: Hon. SAMUEL ALSCHULER, Circuit Judge; Hon. WILLIAM M. SPARKS, Circuit Judge; Hon. JAMES H. WILKERSON, District Judge.

4896

COMMISSIONER OF INTERNAL REVENUE

vs.

THE NEWPORT COMPANY

Petition for review of decision of the United States Board of Tax Appeals

This cause came on to be heard on the transcript of the record from the United States Board of Tax Appeals and was argued by counsel.

On consideration whereof: It is now here ordered and adjudged by this court that the decision of the United States Board of Tax Appeals entered in this case on March 21, 1931, be, and the same is hereby affirmed.

United States Circuit Court of Appeals for the Seventh Circuit

I, Frederick G. Campbell, clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing typewritten and printed pages, numbered from 1 to 10, inclusive, contain a true copy of the proceedings had and papers filed (excepting the briefs of counsel and stipulations and orders relating to the filing of briefs) in the case of *Commissioner of Internal Revenue, petitioner*, vs. *The Newport Company, respondent*, no. 4896, October term, 1932, as the same remains upon the files and records of the United States Circuit Court of Appeals for the Seventh Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the city of Chicago, this third day of October, A.D. 1933.

[SEAL.] FREDERICK G. CAMPBELL,
Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

U. S. GOVERNMENT PRINTING OFFICE: 1933

Supreme Court of the United States

Order allowing certiorari

Filed November 20, 1933

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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In the Supreme Court of the United States

OCTOBER TERM, 1933

No. —

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, petitioner

v.

THE NEWPORT COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Solicitor General, on behalf of Guy T. Helvering, Commissioner of Internal Revenue, prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Seventh Circuit entered in the above-entitled cause July 8, 1933, affirming a decision of the Board of Tax Appeals (R. 143).

OPINIONS BELOW

The opinion of the Circuit Court of Appeals is reported in 65 F. (2d) 925. The opinion of the Board of Tax Appeals (R. 126–143) is reported in 22 B.T.A. 833.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered July 8, 1933. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Respondent, who was liable as transferee of the assets of another corporation, executed after the enactment of the Revenue Act of 1926 an instrument stating that the transferor waives the statutory period for making assessment of its tax liability. The instrument was signed by respondent as "taxpayer" and "as successor in interest" of the transferor. If certain other waivers executed in the name of the transferor after its dissolution should be held invalid, the statute had run before the execution of this waiver. The questions are:

(a) Whether the instrument may be construed as a waiver of the statute of limitations as against respondent.

(b) Whether a waiver executed after the expiration of the statutory period of assessment and after the enactment of Section 1106 of the Revenue Act of 1926, but prior to the effective date of the Revenue Act of 1928, is valid.

2. Whether an informal waiver of the statute of limitations contained in a protest purporting to be made on behalf of respondent's transferor, verified

by respondent's president and filed with petitioner by respondent, is effective to extend the statutory period for making assessment against respondent.

3. Whether respondent is estopped to deny the validity of several waivers executed in the name of its transferor extending from time to time the period of limitations for making assessment of the transferor's tax liability.

4. Whether the decree of the Supreme Judicial Court of Maine, dissolving the transferor is void and, if so, whether it may be attacked in the present proceeding.

STATUTES INVOLVED

The statutes involved will be found in the Appendix, *infra,* pp. 21–26.

STATEMENT

The respondent is a Delaware corporation formed in 1919, with its principal place of business in Wisconsin. The Newport Chemical Works, Inc. (hereinafter called the Chemical Company), was a Maine corporation, with a factory and offices in Wisconsin. The respondent in the middle of 1919 received all of the assets of the Chemical Company in consideration of the issuance of its shares to the stockholders of the Chemical Company and the assumption of all liabilities of the latter. The assets exceeded in value the amount of tax claimed in this proceeding. (R. 128–129.)

The Chemical Company originally filed, on April 1, 1918, separate income tax and excess profits tax

returns for 1917, showing an income tax liability of $18,405.65 and an excess-profits tax liability of $12,892.03. The Newport Mining Company and the Dunn Iron Mining Company filed a consolidated excess-profits tax return. Petitioner later determined that the three companies were affiliated. (R. 128–129, 18.)

On March 1, 1920, the Supreme Judicial Court of Maine entered a decree dissolving the Chemical Company without the appointment of a trustee or receiver. (R. 129.) The decree recited that the cause was heard on bill and answer and that it appeared that the defendant company had no debts and no assets. (R. 21.) The stockholders' bill specifically alleged "That there are existing liabilities against said corporation and no existing assets thereof, requiring distribution among the stockholders." (R. 19.) The answer admitted the averments of the bill. (R. 20.) On the same day a decree was entered dissolving the Newport Mining Company. (R. 129, 21.)

On March 8, 1921, an income and profits tax return of the Chemical Company for the year 1920 was filed with the Collector of Internal Revenue at Milwaukee, Wisconsin, which showed no income and contained the statement "Not active. Dissolved March 1, 1920. Transacted no business whatsoever during year." An accompanying letter from the Chemical Company stated (R. 129):

> You will note that the company did not operate during the year and hence no net in-

come earned. You will further note that the company's affairs have been wound up and the company legally dissolved.

On April 14, 1920, the taxpayer filed with the Collector of Internal Revenue at Milwaukee, Wisconsin, an affiliated corporation questionnaire for the year 1919, which stated that certain companies of the affiliated group, including the Chemical Company and the Newport Mining Company, were in process of dissolution during 1919. The questionnaire stated that the taxpayer as principal or parent, the Newport Mining Company, the Chemical Company and certain other companies were controlled or owned directly or indirectly by Ferdinand Schlesinger, Mathilda Schlesinger, his wife, Armin A. Schlesinger, his son, Henry J. Schlesinger, his son, and Gertrude MacLaren, his daughter, and that the Schlesingers personally directed the central organization conducting the business in all its activities. (R. 129–130.)

On February 12, 1919, at the last stockholder's meeting of the Newport Chemical Works, Incorporated, the following persons were elected as directors of that company: Ferdinand Schlesinger, H. J. Schlesinger, A. A. Schlesinger, E. G. Wilmer, H. H. Springford, J. W. Shaeffer, M. T. MacLaren. At the last meeting of directors, held February 30, 1919, the following persons were elected as officers: Ferdinand Schlesinger, Chairman of the Board of Directors; A. A. Schlesinger, President; H. J. Schlesinger, Vice President; M. T. MacLaren, Vice

President; E. G. Wilmer, Vice President; J. W. Schaeffer, Vice President in charge of operations; H. J. Schlesinger, Treasurer; H. H. Springford, Secretary; Wilmot Saeger, Assistant Secretary; H. H. Springford, Auditor; C. H. Brook, Assistant Auditor; Elbin H. Hillheffer, Vice President in charge of sales. The first Board of Directors elected for the Newport Company on July 15, 1919, consisted of the following: Ferdinand Schlesinger, Chairman; Henry J. Schlesinger (identical with H. J. Schlesinger), Armin A. Schlesinger (identical with A. A. Schlesinger), Myron T. MacLaren, and Edward G. Wilmer. (R. 25–26.)

Thereafter the Commissioner received notice in connection with the Chemical Company's tax returns for the years 1919 and 1920, that the Company was dissolved. (R. 74, 130.)

The statutory period of limitation for assessment and collection of taxes of the Chemical Company for the year 1917 expired on April 1, 1923.

On December 15, 1920, the Chemical Company, by Edward G. Wilmer, vice president, executed an unlimited waiver of 1917 taxes. (R. 130–131.[1]) On August 13, 1923, the Commissioner notified the Newport Mining Company of a determination of additional taxes for 1917 against the Company and its affiliates, including a tax of $116,065.49 against

[1] On April 11, 1923, the Commissioner issued Mimeograph 3085, stating that all unlimited assessment waivers for the year 1917 would be held to expire April 1, 1924. II-1 Cumulative Bulletin 174.

the Chemical Company. (R. 137, 39–45.) The Newport Mining Company, by Charles F. Fawsett, its general counsel, in October, 1923, filed an appeal in behalf of itself and its affiliates, requesting a redetermination, which concludes with the following statement (R. 137):

> This appeal is taken by the Newport Mining Company for and in behalf of each of the subsidiary and affiliated companies named in said letter of the Department of August 13, 1923, as well as on its own behalf, and it is duly authorized to take such appeal.
> (Signed) THE NEWPORT MINING COMPANY,
> By CHARLES FAWSETT,
> *General Counsel.*

The appeal was verified by H. H. Springford, who avers that he was secretary of the Newport Mining Company until its dissolution in 1920; that he was vice president of respondent and president of the Steel & Tube Company of America, between which two companies the stock and assets of the Newport Mining Company had been divided prior to its dissolution; and that he made the verification in his capacity as vice president of respondent and in the other capacities mentioned and was authorized to do so. (R. 38–39.) Fawsett, who signed the appeal for the Newport Mining Company, was counsel for respondent after the Chemical Company was dissolved (R. 27) and as such passed only upon matters referred specially to him (R. 28).

On February 11, 1924, the Commissioner wrote to the Newport Mining Company enclosing forms

of waiver for several companies, including the Chemical Company, stating that the statute of limitations would expire April 1, 1924, and the Bureau would need more time to carefully consider the case. (R. 131, 75–76.) In reply, the Commissioner received a letter from C. W. Westerman, Secretary of the Newport Company, dated February 23, 1923, enclosing a number of waivers, including a waiver of the Chemical Company, signed by H. J. Schlesinger, vice president, extending for one year the time for collecting 1917 taxes. (R. 132, 56–57, 63.)

On December 3, 1924, the Commissioner notified the Chemical Company of a tentative determination of a deficiency for 1917 of $226,710.08. (R. 137, 46–48.) On December 26, 1924, Fawsett, as general counsel of the Chemical Company and certain other companies, wrote to the Commissioner enclosing waivers including one for 1917, signed by the Chemical Company by H. J. Schlesinger, vice president, extending the time for making assessment to April 1, 1926. (R. 52, 133.) Also enclosed with the letter was a protest on behalf of the Newport Mining Company and another company which protested against the determination that the Chemical Company was not affiliated with them. The protest contains the following statement (R. 138):

> The taxpayers hereby place upon record their willingness to file all required waivers to permit of the final determination of the

> above exceptions before the expiration of any period of limitation provided by law, and will forthwith transmit such waivers to be filed in connection herewith as soon as the same can be prepared and properly executed.

The protest was verified by A. A. Schlesinger, who avers that he was vice president and treasurer of the Chemical Company during the tax years in question (1917 and 1918), and was an officer of the other companies mentioned; that he was and is familiar with their affairs and authorized to make the verification. (R. 138, 48–52.)

On December 14, 1925, the Commissioner addressed a 30-day notice to the Chemical Company of a tentative determination of a deficiency of $211,227.75. The notice contained a statement that "1917 waiver filed Dec. 31, 1924 is in effect until April 1, 1926." (R. 138, 53–54.) On January 11, 1926, a protest on behalf of the Chemical Company against this determination was filed by A. A. Schlesinger which contains the following statement (R. 138–139, 58–60):

> The taxpayer hereby places on record its willingness to file all required waivers to permit of the final determination of the above exceptions before the expiration of any period of limitation provided by law and will forthwith transmit such waivers to be filed in connection herewith as soon as the same can be prepared and properly executed, and in the meantime and pending

the receipt of such formal waivers, it agrees that this offer and agreement shall operate and have the full force and effect of such formal waivers in all respects as though the same were filed herewith. (R. 139.)

This protest was sworn to by A. A. Schlesinger in the following form (R. 60, 139):

> A. A. SCHLESINGER being first duly sworn says that he was during the year 1917 the vice-president and treasurer of the Newport Chemical Works, Inc., and continued as such until May, 1919, and thereafter was the president of the company until its dissolution in the year 1920.
>
> That prior to the dissolution of said company all of its assets and property was transferred to and taken over by the Newport Company, a corporation organized under the laws of Delaware, which in consideration thereof assumed and agreed to pay all of the liabilities of said Newport Chemical Works, Inc., and said Newport Company has even since continued to be the owner of all of such property and assets in so far as the same have been preserved or are still in existence. That this affiant is now president of the Newport Company and is in active charge, management and direction of its affairs.
>
> That he has read the foregoing protest and exceptions and that the same are true to the best of his knowledge, information and belief.
>
> [Signed] A. A. SCHLESINGER.

On January 12, 1926, a waiver of time for assessment of 1917 taxes was signed in the name of the Chemical Company by H. J. Schlesinger, vice president, and filed with the Commissioner January 20, 1926, stating that it should be effective until December 31, 1926. (R. 134.)

On November 6, 1926, a waiver extending the period for assessment of the 1917 taxes, to December 31, 1927, was executed by respondent, by A. A. Schlesinger, president. Under the name of respondent appears the word "taxpayer" and below the signature the following words appear "As successors in Interest to the Newport Chemical Works." (R. 135.)

On March 14, 1927, the Commissioner mailed to respondent a 60-day notice proposing to assess, under Section 280 of the Revenue Act of 1926, against respondent as transferee of the Chemical Company, a liability of $43,527.25 for income and profits taxes of the latter company for 1917. (R. 137.) Respondent appealed from the Commissioner's determination to the Board of Tax Appeals.

The Board held that assessment and collection of tax against the Chemical Company were barred after April 1, 1924, and the subsequent waivers were void because the Chemical Company had been dissolved; that since assessment and collection against the transferor, the Chemical Company, were barred prior to the passage of the Revenue Act of 1926, assessment and collection of the liability

of respondent as transferee was also barred. (R. 143.) On appeal, the Circuit Court of Appeals sustained the Board.

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In failing to hold that the waiver dated November 6, 1926, signed by respondent as "taxpayer" and as successor in interest to the Newport Chemical Works, Inc., was sufficient to extend the period of limitations for assessment and collection of the liability of respondent as transferee and successor in interest of the Newport Chemical Works, Inc., for the deficiency in tax of the latter company for the year 1917.

2. In failing to hold that the waiver dated November 6, 1926, signed by respondent as "taxpayer" and as successor in interest to the Newport Chemical Works, Inc., together with the informal waiver incorporated in the protest executed and verified under date of January 8, 1926, signed and sworn to by A. A. Schlesinger, president of respondent, were sufficient to extend the period of limitations for assessment and collection of the liability of respondent as transferee and successor in interst of the Newport Chemical Works, Inc., for the deficiency in tax of the latter company for the year 1917.

3. In failing to hold, upon the facts found, that the Newport Company is estopped to deny the validity of the several waivers set out in the find-

ings of fact executed in the name of the Newport Chemical Works, Inc.

4. In holding that the decree of the Supreme Judicial Court of Maine dated March 1, 1920, was valid and effective to dissolve the Newport Chemical Works, Inc.

5. In failing to hold that the decree of the Supreme Judicial Court of Maine dated March 1, 1920, was void, and subject to collateral attack in this proceeding.

6. In holding that the assessment and collection of the liability of the respondent for taxes imposed upon the Newport Chemical Works, Inc., was barred by the statute of limitations.

7. In failing to hold that respondent was liable under Section 280 of the Revenue Act of 1926 for any deficiency in income tax due from the Newport Chemical Works, Inc., for the taxable year 1917,

REASONS FOR GRANTING THE WRIT

1. The decision of the court below substantially conflicts with the decision in *Phillips* v. *Lyman H. Howe Films Co.*, 33 F. (2d) 891 (C.C.A. 3d). In that case, a corporation formed through the consolidation and merger of two other corporations, signed a waiver for and on behalf of one of the predecessor corporations extending time for making assessments against the latter. The court held that the waiver was effective to extend the period of limitations, thus permitting the consolidated corporation to maintain an action for refund of an

overpayment of tax by the predecessor. In the present case, the waiver dated November 6, 1926, was signed by respondent, as "taxpayer" and "as successor in interest" to the Chemical Company. This waiver states that the Chemical Company consents to the later assessment, etc. The execution of the waiver was the act of respondent and must have been intended by it as a consent on its part to extend the statutory period for assessment and collection of its liability as transferee. Whether it should be construed as a waiver of the time for assessment against the Chemical Company, or against respondent as transferee and obligor, seems unimportant, since the deficiency was asserted against respondent within the time as extended by the terms of the waiver.

The decision is also in substantial conflict with *Lucas* v. *Hunt,* 45 F. (2d) 781 (C.C.A. 5th), and *Warner Collieries Co.* v. *United States,* 63 F. (2d) 34 (C.C.A. 6th).

There were several prior waivers, which will be referred to below, some of which were executed in the name of the Chemical Company after its dissolution. We contend that these waivers were binding on respondent and hence extended the statutory period from time to time so that assessment was not barred at the time the waiver of November 6, 1926, was executed. But even if the earlier waivers are invalid and the statutory period had therefore expired prior to the execution of the

waiver of November 6, 1926, the period could, nevertheless, be waived after its expiration [2] unless such a waiver is made ineffective by the provisions of Section 1106 (a) of the Revenue Act of 1926 (*infra*, p. 24). That section provides that the bar of the statute shall operate to extinguish the liability as well as bar the right, but it was repealed as of the date of its enactment by Section 612 of the Revenue Act of 1928 (*infra*, p. 24). The question of the effect of a waiver given in these circumstances will come before this Court during the present Term in the following cases, which are now pending on certiorari: No. 18, *Guy T. Helvering, Commissioner of Internal Revenue* v. *Northern Coal Company;* No. 19, *Guy T. Helvering, Commissioner of Internal Revenue* v. *C. H. Sprague & Son Company;* No. 20, *Guy T. Helvering, Commissioner of Internal Revenue* v. *United States Refractories Corporation;* No. 21, *Guy T. Helvering, Commissioner of Internal Revenue* v. *Oswego and Syracuse Railroad Company.*

2. The latter question becomes material only in case it should be held that assessment of the tax was barred prior to the execution of the waiver of November 6, 1926. We contend, as stated above, that the bar of the statute had at no time intervened because of waivers executed from time to time in

[2] *McDonnell* v. *United States*, 288 U.S. 420; *Pacific Coast Co.* v. *McLaughlin*, 288 U.S. 426; *Stange* v. *United States*, 282 U.S. 270; *Burnet* v. *Railway Equipment Co.*, 282 U.S. 295.

the name of the Chemical Company. But even if they were invalid, the informal waiver contained in a protest filed with petitioner on January 11, 1926, was effective to revive and extend the statutory period until the waiver of November 6, 1926, was executed. The protest related to the tax liability of the Chemical Company but it was signed and sworn to by the president of the respondent. It states that the "taxpayer" records its willingness to file all required waivers to permit final determination of the exceptions taken to a proposed assessment, and agrees that the protest shall operate as a waiver until formal waivers are filed. (R. 138–139.) This clearly evidenced the intention of the respondent to waive any limitation for assessment of the tax against itself. The statute does not prescribe the form of waiver, nor is statutory authority necessary to make a valid waiver. *Aiken* v. *Burnet,* 282 U.S. 277; *Brown & Sons Co.* v. *Burnet,* 282 U.S. 283. This informal waiver would seem to be sufficient unless the Commissioner's signature is necessary. This question is now before this Court in No. 20, *Helvering* v. *United States Refractories Corporation, supra.*

3. Of the prior waivers, the first one signed by the Chemical Company was given December 15, 1920, and expired April 1, 1924. No question regarding this waiver has been raised. Thereafter three waivers were given which extended the statutory period from the latter date from time to time until December 31, 1926, without any break.

(R. 132–134.) These waivers were signed in the name of the Chemical Company, by H. J. Schlesinger, vice president. They were held invalid because the Chemical Company, under the decree of the Supreme Judicial Court of Maine (R. 129) had ceased to exist after March 1, 1920. The evidence shows that these waivers were procured by and signed with the assent of the respondent. (R. 32–33, 36–39, 48–52, 58–60, 63.) The respondent was the real party in interest and received the benefit of the reconsideration given to the tax liability of the Chemical Company. We believe the ruling of the court, so far as these waivers are concerned, conflicts in principle with the decision in *Warner Collieries Co.* v. *United States, supra.*

4. The decision of the court below in holding valid the decree of the Supreme Judicial Court dissolving the Chemical Company seems to be contrary in principle to decisions of this Court.

The statutes of Maine provide that the Supreme Judicial Court upon application by bill in equity may decree the dissolution of a corporation and upon dissolving such corporation shall appoint one or more trustees; but upon proof that there are no existing liabilities and no existing assets requiring distribution among the stockholders the court may dissolve the corporation without the appointment of trustees or receivers. Revised Statutes of Maine, 1916, c. 51, Sections 89, 90 (*infra,* pp. 24, 25). Here the bill of the Chemical Company's stockholders recited that there were existing liabilities

and no existing assets. (R. 19.) The corporation's answer admitted all the averments of the bill. (R. 20.) The decree recited that the cause was heard upon bill and answer, but nevertheless it was ordered that the corporation should be dissolved without appointment of a trustee or receiver. (R. 21.) There was thus no provision made for the appointment of any person to collect or administer any corporate funds for the benefit of creditors despite the fact that it appeared on the face of the record that there were existing liabilities.

It would seem that under these circumstances the court had no jurisdiction or power to enter a decree of dissolution without the appointment of trustees. It is made by statute a condition precedent to such decree that there shall be no existing liabilities and the record of the proceedings discloses on its face that the jurisdictional prerequisites for the decree were lacking. Where it appears that facts necessary for jurisdiction were absent the judgment of a court is void and may be collaterally attacked. Cf. *Thompson* v. *Whitman,* 18 Wall. 457; *Williamson* v. *Berry,* 8 How. 495; *Old Wayne Life Ass'n* v. *McDonough,* 204 U.S. 8; *Simon* v. *Southern Railway,* 236 U.S. 115, 126–128. The same is true when it appears that the court did not have jurisdiction to grant the particular remedy which was given or where the remedy granted was without the scope of the prayer. *Glover* v. *Brown,* 32 Idaho 426; *Sache* v. *Wallace,* 101 Minn. 169; *Cushman* v. *Warren-Scharf Asphalt*

Paving Co., 220 Fed. 857, 861 (C.C.A. 7th), certiorari denied, 238 U.S. 621. Likewise the judgment is void and subject to collateral attack where the court has jurisdiction of the subject matter and the parties but enters a judgment outside the power granted by law. *United States* v. *Walker*, 109 U.S. 258, 266–267; *Bigelow* v. *Forrest*, 9 Wall, 339; *Windsor* v. *McVeigh*, 93 U.S. 274, 282–283.

Since the Maine court transcended in the extent and character of its decree the law which was applicable to it, the decree is void and ineffective to accomplish a dissolution and invalidate the waivers. The failure to appoint a trustee or receiver is more than a mere procedural defect. See *Elston* v. *Elston & Co.*, 159 Atl. 731. Cf. *In re Wolf Mfg. Industries*, 56 F. (2d) 64 (C.C.A. 7th).

5. It is important that the question be settled whether a taxpayer who is liable as transferee is bound by a waiver on behalf of its transferor, both where the waiver is executed by the transferee and where the transferee secures its execution in the name of a transferor corporation which has been dissolved. These questions are involved in three cases now pending in the Circuit Court of Appeals for the Seventh Circuit, involving about $2,000,000 in taxes. In those cases, which were consolidated before the Board of Tax Appeals, the petitioners before the Board were this respondent and the Youngstown Sheet & Tube Company. Tax liabilities were asserted against them as transferees, re-

spectively, of the assets of a number of other corporations, including in the case of this respondent liabilities of the Chemical Company for taxable years other than 1917. There is involved in that case also construction of the waiver given by the respondent dated November 6, 1926, referred to above, and there are other facts which are similar to those in the present case. The question of whether a transferee, who is liable for a tax imposed upon the transferor, may waive the period of limitations against the transferor is also involved in a case now pending in the Ninth Circuit (*Commissioner* v. *Elmer D. Bryson*). In view of the conflict mentioned above, the question will very likely continue to arise, and it should therefore be settled by this Court.

Wherefore, it is respectfully urged that this petition for a writ of certiorari to review the judgment of the Circuit Court of Appeals for the Seventh Circuit be granted.

J. CRAWFORD BIGGS,
Solicitor General.

OCTOBER 1933.

APPENDIX

REVENUE ACT OF 1924, C. 234, 43 STAT. 253

SEC. 277. (a) Except as provided in section 278 * * *

* * * * *

(2) The amount of income, excess-profits, and war-profits taxes imposed by * * * the Revenue Act of 1916, the Revenue Act of 1917, * * * and by any such Act as amended, shall be assessed within five years after the return was filed, and no proceeding in court for the collection of such taxes shall be begun after the expiration of such period. (U.S.C., Title 26, Sec. 1057.)

SEC. 278. (c) Where both the Commissioner and the taxpayer have consented in writing to the assessment of the tax after the time prescribed in section 277 for its assessment the tax may be assessed at any time prior to the expiration of the period agreed upon. (U.S.C., Title 26, Sec. 1060.)

REVENUE ACT OF 1926, C. 27, 44 STAT. 9

SEC. 274. (a) If in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect of the tax imposed by this title, the Commissioner is authorized to send notice of such deficiency to the taxpayer by registered mail. Within 60 days after such notice is mailed (not counting

Sunday as the sixtieth day), the taxpayer may file a petition with the Board of Tax Appeals for a redetermination of the deficiency. Except as otherwise provided in subdivision (d) or (f) of this section or in sections 279, 282, or 1001, no assessment of a deficiency in respect of the tax imposed by this title and no distraint or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such 60-day period, nor, if a petition has been filed with the Board, until the decision of the Board has become final. Notwithstanding the provisions of section 3224 of the Revised Statutes the making of such assessment or the beginning of such proceeding or distraint during the time such prohibition is in force may be enjoined by a proceeding in the proper court. (U.S.C.App., Title 26, Sec. 1048.)

Subparagraph (a) (3) of Section 277 (U.S.C.App., Title 26, Sec. 1057) is substantially the same as subparagraph (a) (2), Section 277 of the Revenue Act of 1924, given above.

Section 278, paragraph (c) (U.S.C.App, Title 26, Sec. 1060), is the same as 278 (c) of the Revenue Act of 1924, given above.

SEC. 280. (a) The amounts of the following liabilities shall, except as hereinafter in this section provided, be assessed, collected, and paid in the same manner and subject to the same provisions and limitations as in the case of a deficiency in a tax imposed by this title (including the provisions in case of delinquency in payment after notice and demand, the provisions authorizing distraint and

proceedings in court for collection, and the provisions prohibiting claims and suits for refunds):

(1) The liability, at law or in equity, of a transferee of property of a taxpayer, in respect of the tax (including interest, additional amounts, and additions to the tax provided by law) imposed upon the taxpayer by this title or by any prior income, excess-profits, or war-profits tax Act.

* * * * *

(b) The period of limitation for assessment of any such liability of a transferee or fiduciary shall be as follows:

(1) Within one year after the expiration of the period of limitation for assessment against the taxpayer; or

* * * * *

(c) For the purposes of this section, if the taxpayer is deceased, or in the case of a corporation, has terminated its existence, the period of limitation for assessment against the taxpayer shall be the period that would be in effect had the death or termination of existence not occurred.

(d) The running of the period of limitation upon the assessment of the liability of a transferee or fiduciary shall, after the mailing of the notice under subdivision (a) of section 274 of the transferee of fiduciary, be suspended for the period during which the Commissioner is prohibited from making the assessment in respect of the liability of the transferee or fiduciary, and for 60 days thereafter. (U.S.C.App., Title 26, Sec. 1069.)

SEC. 1106. (a) The bar of the statute of limitations against the United States in respect of any internal-revenue tax shall not only operate to bar the remedy but shall extinguish the liability; but no credit or refund in respect of such tax shall be allowed unless the taxpayer has overpaid the tax. The bar of the statute of limitations against the taxpayer in respect of any internal-revenue tax shall not only operate to bar the remedy but shall extinguish the liability; but no collection in respect of such tax shall be made unless the taxpayer has underpaid the tax. (U.S.C.App., Title 26, Sec. 1249.)

REVENUE ACT OF 1928, C. 852, 45 STAT. 791, 875

SEC. 612. REPEAL OF SECTION 1106 (a) OF 1926 ACT.

Section 1106 (a) of the Revenue Act of 1926 is repealed as of February 26, 1926.

REVISED STATUTES OF MAINE (1916), C. 51

SEC. 81. *Existence after charter expires.* R.S., c. 47, §77. Corporations, whose charters expire or are otherwise terminated, have a corporate existence for three years thereafter; to prosecute and defend suits; to settle and close their concerns; to dispose of their property; and to divide their capitals.

SEC. 89. *Bill in equity against corporations for dissolution; if no liabilities, dissolution may be had without trustees.* R.S., c. 47, § 80. Except where otherwise provided by statute, whenever at any meeting of its stockholders, legally called there-

for, such stockholders vote to dissolve such corporation, a bill in equity against the same for dissolution thereof, may be filed by any officer, stockholder or creditor in the supreme judicial court, in the county in which it has an established place of business, or in which it held its last stockholders' meeting; upon said bill, such notice shall be given as may be ordered by any justice of said court, in term time or vacation, and upon proof thereof, such proceedings may be had according to the usual course of suits in equity, that said corporation shall be dissolved and terminated. Upon proof that there are no existing liabilities against said corporation, and no existing assets thereof, requiring distribution among the stockholders, said court may dissolve said corporation without the appointment of trustees or receivers.

SEC. 90. *Jurisdiction of court; court may superintend collection and distribution of assets.* R.S. c. 47, § 81. Said court has jurisdiction in said cause to appoint receivers, issue injunctions, and pass interlocutory decrees and orders, according to the usual course of proceedings, in equity; and shall, moreover, upon dissolving said corporation, or upon terminating its charter, appoint one or more trustees, who shall have all the powers conferred upon similar trustees by sections eighty-one, eighty-eight and ninety-eight, or by any other law of the state, with such special powers as may be given them by said court. But, notwithstanding the appointment of such trustees, said court may superintend the collection and distribution of the assets of said corporation, and may retain said bill for that purpose.

SEC. 101. *Capital not to be divided until debts paid.* R.S. c. 47, § 92. Corporations, not created for literary, benevolent or banking purposes, shall not so divide any of their corporate property as to reduce their stock below its par value, until all debts are paid, and then only for the purpose of closing their concerns.

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In the Supreme Court of the United States

OCTOBER TERM, 1933

No. 515

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, petitioner

v.

THE NEWPORT COMPANY

ON A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the Circuit Court of Appeals (R. 159–164) is reported in 65 F. (2d) 925. The opinion of the Board of Tax Appeals (R. 126–143) is reported in 22 B.T.A. 833.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered July 8, 1933. (R. 164.) A petition for a writ of certiorari was filed on October 7, 1933, and was granted November 20, 1933. (R. 166.) The jurisdiction of this Court rests on Section 240

(a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Respondent, who was liable as transferee of the assets of another corporation, executed after the enactment of the Revenue Act of 1926 an instrument stating that the transferor waives the statutory period for making assessment of its tax liability. The instrument was signed by respondent as "taxpayer" and "as successor in interest" of the transferor. If certain other waivers executed in the name of the transferor after its dissolution should be held invalid, the statute had run before the execution of this waiver. The questions are:

(a) Whether the instrument may be construed as a waiver of the statute of limitations as against the respondent.

(b) Whether a waiver executed after the expiration of the statutory period of assessment and after the enactment of Section 1106 of the Revenue Act of 1926, but prior to the effective date of the Revenue Act of 1928, is valid.

2. Whether an informal waiver of the statute of limitations contained in a protest purporting to be made on behalf of the respondent's transferor, verified by the respondent's president and filed with the petitioner by the respondent, is effective to extend the statutory period for making assessment against the respondent.

3. Whether the respondent is estopped to deny the validity of several waivers executed in the name of its transferor extending from time to time the period of limitations for making assessment of the transferor's tax liability.

4. Whether the decree of the Supreme Judicial Court of Maine, dissolving the transferor is void and, if so, whether it may be attacked in the present proceeding.

STATUTES INVOLVED

The statutes involved are set forth in the Appendix, *infra*, pp. 40–45.

STATEMENT

The respondent is a Delaware corporation formed in 1919, with its principal place of business in Wisconsin. The Newport Chemical Works, Inc. (hereafter called the Chemical Company), was a Maine corporation, with a factory and offices in Wisconsin. (R. 128.) On April 1, 1918, the Chemical Company filed its income tax and excess-profits tax returns for 1917, showing an income tax liability of $18,405.65, and an excess-profits tax liability of $12,892.03. (R. 128, 18.)

In the middle of the year 1919 the Chemical Company transferred all of its assets to the respondent in consideration of the issuance by the respondent of its stock to the stockholders of the Chemical Company. In connection with the transfer and as part of the consideration, the respondent assumed all of the liabilities of the Chemical Com-

pany. The assets received by the respondent exceeded in value the amount of tax claimed in this proceeding. (R. 129.)

On March 1, 1920, the Supreme Judicial Court of Maine entered a decree dissolving the Chemical Company without the appointment of a trustee or receiver. (R. 129.) The decree recited that the cause was heard on bill and answer and that it appeared that the defendant company had no debts and no assets. (R. 21.) The stockholders' bill specifically alleged "That there are existing liabilities against said corporation and no existing assets thereof, requiring distribution among the stockholders." (R. 19.) The answer admitted the averments of the bill. (R. 20.) On the same day a decree was entered dissolving the Newport Mining Company, which was affiliated with the Chemical Company. (R. 129, 21.)

On April 14, 1920, the respondent filed with the Collector of Internal Revenue at Milwaukee, Wisconsin, an affiliated corporation questionnaire for the year 1919, which stated that certain companies of the affiliated group, including the Chemical Company and the Newport Mining Company, were in process of dissolution during 1919. The questionnaire stated that the respondent as principal or parent, the Newport Mining Company, the Chemical Company and certain other companies were controlled or owned directly or indirectly by Ferdinand Schlesinger, Mathilda Schlesinger, his wife, Armin A. Schlesinger, his son, Henry J. Schles-

inger, his son, and Gertrude MacLaren, his daughter, and that the Schlesingers personally directed the central organization conducting the business in all its activities. (R. 129–130.)[1]

On March 8, 1921, an income and profits tax return of the Chemical Company for the year 1920 was filed with the Collector of Internal Revenue at Milwaukee, Wisconsin, which showed no income and contained the statement "Not active. Dissolved March 1, 1920. Transacted no business whatsoever during year." An accompanying letter from the Chemical Company stated (R. 129):

> You will note that the company did not operate during the year and hence no net income earned. You will further note that the company's affairs have been wound up and the company legally dissolved.

The Commissioner also received notice from the respondent in 1922 that the Chemical Company had been dissolved in 1920. (R. 74, 130.)

The statutory period of limitation for assessment and collection of taxes of the Chemical Company for the year 1917 expired on April 1, 1923, five years after the return for that year had been filed. Whether this period was extended so as to make valid the asessment of the tax involved in this case depends on the validity and effect of several waivers.

---

[1] The final board of directors of the Chemical Company and the first board of directors of the respondent were substantially identical (R. 25–26).

On December 15, 1920, the Chemical Company, by Edward G. Wilmer, vice president, executed an unlimited waiver of the statute of limitations with respect to 1917 taxes. (R. 130–131.)[2] On August 13, 1923, the Commissioner notified the Newport Mining Company of a determination of additional taxes for 1917 against the Company and its affiliates, including a tax of $116,065.49 against the Chemical Company. (R. 137, 39–45.) The Newport Mining Company, by Charles F. Fawsett, its general counsel, in October, 1923, filed an appeal in behalf of itself and its affiliates, requesting a redetermination, which concludes with the following statement (R. 137):

> This appeal is taken by the Newport Mining Company for and in behalf of each of the subsidiary and affiliated companies named in said letter of the Department of August 13, 1923, as well as on its own behalf, and it is duly authorized to take such appeal.
>
> (Signed) THE NEWPORT MINING COMPANY,
> By CHARLES FAWSETT,
> *General Counsel.*

The appeal was verified by H. H. Springford, who averred that he was secretary of the Newport Mining Company until its dissolution in 1920; that he was vice president of the respondent and presi-

[2] On April 11, 1923, the Commissioner issued Mimeograph 3085, stating that all unlimited assessment waivers for the year 1917 would be held to expire April 1, 1924. II-1 Cumulative Bulletin 174.

dent of the Steel & Tube Company of America, between which two companies the stock and assets of the Newport Mining Company had been divided prior to its dissolution; and that he made the verification in his capacity as vice president of the respondent and in the other capacities mentioned and was authorized to do so. (R. 38–39.) Fawsett, who signed the appeal for the Newport Mining Company, was counsel for the respondent after the Chemical Company was dissolved (R. 27) and as such passed only upon matters referred specially to him (R. 28).

On February 11, 1924, the Commissioner wrote to the Newport Mining Company enclosing forms of waiver for several companies, including the Chemical Company, stating that the statute of limitations would expire April 1, 1924, and the Bureau would need more time for careful consideration of the case. (R. 131, 75–76.) In reply, the Commissioner received a letter from C. W. Westerman, Secretary of the Newport Company, dated February 23, 1924, enclosing a number of waivers, including a waiver of the Chemical Company, signed by H. J. Schlesinger, vice president, extending for one year the time for collecting 1917 taxes. (R. 132, 56–57, 63.)

On December 3, 1924, the Commissioner notified the Chemical Company of a tentative determination of a deficiency for 1917 of $226,710.08. (R. 137, 46–48.) On December 26, 1924, Fawsett, as

general counsel of the Chemical Company and certain other companies, wrote to the Commissioner enclosing waivers including one for 1917, signed by the Chemical Company by H. J. Schlesinger, vice president, extending the time for making assessment to April 1, 1926. (R. 52; 133.) Also enclosed with the letter was a protest on behalf of the Newport Mining Company and another company which protested against the determination that the Chemical Company was not affiliated with them. The protest contains the following statement (R. 138):

> The taxpayers hereby place upon record their willingness to file all required waivers to permit of the final determination of the above exceptions before the expiration of any period of limitation provided by law and will forthwith transmit such waivers to be filed in connection herewith as soon as the same can be prepared and properly executed.

The protest was verified by A. A. Schlesinger, who averred that he was vice president and treasurer of the Chemical Company during the tax years in question (1917 and 1918), and was an officer of the other companies mentioned; that he was and is familiar with their affairs and authorized to make the verification. (R. 138, 48–52.)

On December 14, 1925, the Commissioner addressed a 30-day notice to the Chemical Company of a tentative determination of a deficiency of $211,227.75. The notice contained a statement that

"1917 waiver filed Dec. 31, 1924 is in effect until April 1, 1926." (R. 138, 53–54.) On January 11, 1926, a protest, executed January 8, 1926, on behalf of the Chemical Company against this determination was filed by A. A. Schlesinger, which contains the following statement (R. 138–139, 58–60):

> The taxpayer hereby places on record its willingness to file all required waivers to permit of the final determination of the above exceptions before the expiration of any period of limitation provided by law and will forthwith transmit such waivers to be filed in connection herewith as soon as the same can be prepared and properly executed, and in the meantime and pending the receipt of such formal waivers, it agrees that this offer and agreement shall operate and have the full force and effect of such formal waivers in all respects as though the same were filed herewith.

This protest was sworn to by A. A. Schlesinger in the following form (R. 60, 139):

> A. A. SCHLESINGER being first duly sworn says that he was during the year 1917 the vice-president and treasurer of the Newport Chemical Works, Inc., and continued as such until May 1919, and thereafter was the president of the company until its dissolution in the year 1920.
>
> That prior to the dissolution of said company all of its assets and property was transferred to and taken over by the Newport Company, a corporation organized un-

der the laws of Delaware which in consideration thereof assumed and agreed to pay all of the liabilities of said Newport Chemical Works, Inc. and said Newport Company has ever since continued to be the owner of all of such property and assets in so far as the same have been preserved or are still in existence. That this affiant is now president of the Newport Company and is in active charge, management and direction of its affairs.

That he has read the foregoing protest and exceptions and that the same are true to the best of his knowledge, information and belief.

[Signed] A. A. SCHLESINGER.

On January 12, 1926, a waiver of time for the assessment of 1917 taxes was signed in the name of the Chemical Company by H. J. Schlesinger, vice president, and filed with the Commissioner January 20, 1926. This waiver was in terms effective until December 31, 1926. (R. 134.)

On November 6, 1926, a waiver extending the period for assessment of the 1917 taxes to December 31, 1927, was executed by the respondent, by A. A. Schlesinger, president. Under the name of the respondent appears the word "taxpayer" and below the signature the following words appear "As successors in Interest to the Newport Chemical Works." (R. 135.)

On March 14, 1927, the Commissioner mailed to the respondent a 60-day notice proposing to assess,

under Section 280 of the Revenue Act of 1926, against the respondent as transferee of the Chemical Company, a liability of $43,527.25 for income and profits taxes of the latter company for 1917. (R. 137.) The respondent appealed from the Commissioner's determination to the Board of Tax Appeals.

The Board held that assessment and collection of the tax against the Chemical Company were barred after April 1, 1924, and that the subsequent waivers were void because the Chemical Company had been dissolved; that since assessment and collection against the transferor, the Chemical Company, were barred prior to the passage of the Revenue Act of 1926, assessment and collection of the liability of the respondent as transferee was also barred. (R. 143.) On appeal, the Circuit Court of Appeals sustained the Board.

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In failing to hold that the waiver dated November 6, 1926, signed by the respondent as "taxpayer" and as successor in interest to the Newport Chemical Works, Inc., was sufficient to extend the period of limitations for assessment and collection of the liability of the respondent as transferee and successor in interest of the Newport Chemical Works, Inc., for the deficiency in tax of the latter company for the year 1917.

2. In failing to hold that the waiver dated November 6, 1926, signed by the respondent as "taxpayer" and as successor in interest to the Newport Chemical Works, Inc., together with the informal waiver incorporated in the protest executed and verified under date of January 8, 1926, signed and sworn to by A. A. Schlesinger, president of respondent, were sufficient to extend the period of limitations for assessment and collection of the liability of respondent as transferee and successor in interest of the Newport Chemical Works, Inc., for the deficiency in tax of the latter company for the year 1917.

3. In holding that the decree of the Supreme Judicial Court of Maine dated March 1, 1920, was valid and effective to dissolve the Newport Chemical Works, Inc.

4. In failing to hold that the decree of the Supreme Judicial Court of Maine dated March 1, 1920, was void, and subject to collateral attack in this proceeding.

5. In failing to hold, upon the facts found, that the Newport Company is estopped to deny the validity of the several waivers set out in the findings of fact executed in the name of the Newport Chemical Works, Inc.

6. In holding that the assessment and collection of the liability of the respondent for taxes imposed upon the Newport Chemical Works, Inc., were barred by the statute of limitations.

7. In failing to hold that respondent was liable under Section 280 of the Revenue Act of 1926 for any deficiency in income tax due from the Newport Chemical Works, Inc., for the taxable year 1917.

SUMMARY OF ARGUMENT

I

The assessment and collection of the taxes from the respondent as a transferee of the Newport Chemical Works, Inc., are not barred by the statute of limitations. The waivers filed by respondent as transferee were alone sufficient to extend the time. The waiver of November 6, 1926, signed by the respondent as "taxpayer" and as "successor in Interest to the Newport Chemical Works" was obviously intended to extend the period for the assessment of the respondent's transferee liability. It extended the time to December 31, 1927, within which time the deficiency notice was sent and this appeal was taken. A waiver given after the statute has run is not void. The waiver was sufficient, standing alone, unless made ineffective by Section 1106 (a) of the Revenue Act of 1926. The Government's argument with respect to the effect of that section and its retroactive repeal by Section 612 of the 1928 Act is fully treated in the Government's brief in *Helvering* v. *Oswego & Syracuse Railroad Co.,* No. 21, present term, to which the Court is respectfully referred.

The question of whether Section 1106 (a) of the 1926 Act extinguished the liability becomes material only in case it should be held that assessment of the tax was barred prior to the execution of the waiver of November 6, 1926. The informal waiver contained in a protest filed with the Commissioner on January 11, 1926, was effective to extend the period until the waiver of November 6, 1926, was executed, so that Section 1106 (a) never became operative. This informal waiver evidenced the intention of the respondent to waive any limitation for assessment of the tax against itself. The fact that it was informal and did not specify a time limit did not invalidate it. It was an effective waiver unless the Commissioner's signature is necessary. The Government's argument on that question is fully treated in the Government's brief in *Helvering* v. *United States Refractories Corp.*, No. 20, present term.

II

The earlier waivers signed in the name of the Chemical Company by H. J. Schlesinger, its vice-president, were also effective to extend the time. The respondent through its officers and agents procured the waivers and participated in their execution and filing. The respondent was liable for the tax and the extension was for its benefit. Therefore, the waivers should be deemed the acts of the respondent and should be held to bind the respondent. Considered in conjunction with the transferee waiver of November 6, 1926, they extended

the time in an unbroken chain to December 31, 1927, within which time the notice was sent.

Moreover, respondent, having filed these waivers for the purpose of extending the time in order that various protests which it had caused to be filed might be fully considered by the Commissioner and having received a substantial reduction in the proposed tax by virtue of this extension and reconsideration, is now estopped to deny the validity of the waivers.

The decree of the Maine court dissolving the Chemical Company was void because it was entered on a record showing existing liabilities whereas, the state statute makes it a condition precedent to such a decree that there be no existing liabilities. The decree, being void, the Chemical Company continued in existence, at least for the purpose of executing the waivers in question. Such waivers extended the time to December 31, 1926, so that the deficiency notice mailed to the respondent as transferee within one year thereafter was timely.

ARGUMENT

There is no question here as to the *amount* of the deficiency in taxes of the Newport Chemical Works, Inc. (hereafter called the Chemical Company), for the year 1917.[3] Nor is there any question as to the

[3] While the deficiency notice asserted a liability of $43,527.25 (R. 9), the Commissioner has conceded that the amount of the Chemical Company's taxable income should be decreased by an allowance of a deduction of $11,335.69 for the year 1917 (R. 127, 140).

liability of the respondent as a transferee for this deficiency. The sole issue presented is whether the assessment of the admitted liability of the respondent as transferee is barred by the statute of limitations.

The income and profits tax return of the Chemical Company for the year 1917 was filed April 1, 1918. (R. 128.) In the absence of valid waivers the five-year period for assessment as against the Chemical Company expired on April 1, 1923. Sec. 277 (a) (3) of the Revenue Act of 1926 (*infra*, p. 41). Under Section 280 (b) (1) of the 1926 Act (*infra*, p. 42), the period of limitation for assessment of a transferee's liability is one year after the expiration of the period of limitations against the transferor. So, in the absence of valid waivers the period for assessment against the respondent expired on April 1, 1924.

The deficiency notice in this case was not mailed until March 14, 1927. (R. 137.) However, a series of waivers was filed, which, we contend, was effective to extend the period for assessment until December 31, 1927. These waivers may be conveniently classified into two groups: (1) a series of waivers, executed in the name of the Chemical Company after its dissolution, which in terms extended the period for assessment to December 31, 1926; and (2) two waivers signed by the respondent itself, these being (a) an informal waiver filed by the respondent on January 11, 1926, agreeing to extend

the period for assessment until formal waivers were filed, and (b) a formal waiver executed by the respondent on November 6, 1926, extending the statutory period to December 31, 1927. The court below held that waivers executed after the Chemical Company had ceased to exist were void, and made no distinction between those waivers executed in the name of the Chemical Company and those executed by the respondent as transferee. We contend that all of these waivers were binding on the respondent and served to extend the statutory period from time to time so that assessment was not barred when the deficiency notice was mailed.

The waivers executed by the respondent itself will be considered first. If we are right in our contention that these waivers were sufficient by themselves to extend the period, then we need not rely on the earlier waivers executed in the name of the Chemical Company.

I

THE WAIVERS EXECUTED BY THE RESPONDENT WERE SUFFICIENT BY THEMSELVES TO EXTEND THE STATUTORY PERIOD FOR ASSESSMENT

Our first contention is that the last waiver, that of November 6, 1926, was itself sufficient to extend the time for assessment. This waiver by its terms remained in effect until December 31, 1927. (R. 62, 135.) Prior to that date (on March 14, 1927), the deficiency notice was sent and this appeal

was taken. Therefore, if this waiver was valid, it alone served to extend the period for assessment until the date of the deficiency notice and the assessment of the tax is not now barred.[4]

It seems clear that this was a valid waiver by the respondent. It expressly waived "the time prescribed by law for making any assessment of the amount of income, excess-profits, or war-profits taxes due under any return made by or on behalf of said taxpayer [Newport Chemical Works] for the years 1917 * * *". (R. 62, 135.) It was signed by the respondent as "taxpayer" and "as successor in Interest to the Newport Chemical Works," and was executed by A. A. Schlesinger, president of the respondent. It bore the corporate seal of the respondent. (R. 62.) The obvious purpose of this waiver was to extend the statutory period for assessment and collection of the respondent's liability as transferee. The fact that the instrument stated that "Newport Chemical Works" hereby waives the time prescribed by law for making assessment

[4] The waiver expressly provided that if a deficiency notice was sent prior to December 31, 1927, and an appeal to the Board of Tax Appeals was taken therefrom, the time for assessment should be further extended by the number of days between the date of the mailing of the notice and the date of the final decision by the Board. (R. 62.) Aside from this, the appeal to the Board under Section 283 (a) of the 1926 Act (*infra*, p. 43), served as a stay of the statute until the decision of the Board becomes final, and for sixty days thereafter. See Section 274 (a) and Section 277 (b) of the Revenue Act of 1926 (*infra*, pp. 40, 41); *Brown & Sons Co.* v. *Burnet*, 282 U.S. 283.

does not mean that the waiver was any the less the act of the respondent. The respondent had been organized to take over the business formerly carried on by the Chemical Company. It had acquired all of its assets and assumed all of its liabilities. The respondent's stockholders had been stockholders in the Chemical Company. (R. 128–129.) The respondent was liable for the tax and was the party directly interested in securing an extension of the statutory period in order that a protest that it had previously filed might receive due consideration. (R. 60, 139.) Under the respondent's own theory the Chemical Company was dissolved and was unable to execute a waiver. Consequently, a waiver executed by the respondent as the "taxpayer" and as "successor in Interest to the Newport Chemical Works" must have been intended as a waiver of the period for the assessment of the respondent's transferee liability. "It must be assumed that an effective and not a futile act was intended." *Stange* v. *United States,* 282 U.S. 270, 277.

The courts have held that a transferee is bound by a waiver executed by it in the name of the transferor. Thus in *Phillips* v. *Lyman H. Howe Films Co.,* 33 F. (2d) 891 (C.C.A. 3d), a corporation formed through the consolidation and merger of two other corporations signed a waiver on behalf of one of the predecessor corporations extending the time for making assessments against the latter.

The court held that the waiver was effective to extend the period of limitations, thus permitting the consolidated corporation to maintain an action for refund of an overpayment of tax by the predecessor. See also *Warner Collieries Co.* v. *United States*, 63 F. (2d) 34 (C.C.A. 6th); *Lucas* v. *Hunt*, 45 F. (2d) 781 (C.C.A. 5th); *In re Wolf Mfg. Industries*, 56 F. (2d) 64, 67 (C.C.A. 7th).

Whether the waiver in this case should be construed as a waiver of the time for assessment against the Chemical Company, or against the respondent as transferee and obligor, seems unimportant, since the deficiency was asserted against the respondent within the time as extended by the terms of the waiver. The mere fact that the waiver was given after the statute had run is immaterial,[5] for it is settled that waivers executed after the running of the statute of limitations are not for that reason invalid. See *McDonnell* v. *United States*, 288 U.S. 420; *Stange* v. *United States*, 282 U.S. 270, *supra*; *Brown & Sons Co.* v. *Burnet*, 282 U.S. 283, *supra*; *Burnet* v. *Railway Equipment Co.*, 282 U.S. 295.

Unless this waiver is made ineffective by the provisions of Section 1106 (a) of the Revenue Act

[5] This statement is made on the assumption that the earlier waivers above referred to were void. We contend later, however, that they were valid and extended the statutory period from time to time so that assessment was not barred at the time the waiver of November 6, 1926, was executed.

of 1926 (*infra*, p. 44), we contend that there is no reason why it should not be given the effect it obviously was intended to accomplish. That section provides that the bar of the statute shall operate to extinguish the liability as well as bar the remedy; but this provision was repealed as of the date of its enactment by Section 612 of the Revenue Act of 1928 (*infra*, p. 44). The Government's argument with respect to the effect of Section 1106 (a) and its retroactive repeal is fully treated in the Government's brief in *Helvering* v. *Oswego & Syracuse R. Co.*, No. 21, present term. For the reasons there stated we submit that the waiver of November 6, 1926, is sufficient of itself to extend the period of limitations. The decision of the Circuit Court of Appeals for the Second Circuit in that case (62 F. (2d) 518) was affirmed by this Court on October 23, 1933, but by an equally divided court.

If the Court should hold that the waiver of November 6, 1926, standing alone, is ineffective because of Section 1106 (a) of the 1926 Act, then we rely on the informal waiver of January 11, 1926. This waiver was given prior to the effective date of the 1926 Act (February 26, 1926). Therefore, if this waiver was valid and effective to extend the period to November 6, 1926, when the formal waiver was given, then Section 1106 (a) never became operative.

This waiver of January 11, 1926, was an informal waiver, attached to a "Protest of the Newport Chemical Works, Inc." (R. 58–60.) The Commissioner under date of December 14, 1925, had proposed an additional tax against the Chemical Company for the year 1917 in the amount of $211,227.75. (R. 53.) A protest was filed in the name of the Chemical Company, requesting a re-determination and asking for a conference. (R. 58–59.) The following statement was incorporated in the protest (R. 60):

> WAIVERS TO BE FURNISHED
>
> The taxpayer hereby places on record its willingness to file all required waivers to permit of the final determination of the above exceptions before the expiration of any period of limitation provided by law, and will forthwith transmit such waivers to be filed in connection herewith as soon as the same can be prepared and properly executed, and in the meantime and pending the receipt of such formal waivers, it agrees that this offer and agreement shall operate and have the full force and effect of such formal waivers in all respects as though the same were filed herewith.

Attached to the protest was an affidavit of the respondent's president (R. 60) the text of which has been set out above (*supra*, pp. 9–10).

This offer to supply formal waivers and the statement that "this offer and agreement shall operate

and have the full force and effect of such formal waivers in all respects as though the same were filed herewith" must be taken as the act of the respondent. The affidavit attached to the protest shows plainly that the respondent itself was the active party in making the protest. The affidavit was executed by the respondent's president and contained the statement that the Chemical Company had been dissolved and that the respondent had acquired all of that company's assets and had assumed its liabilities. As stated above, the respondent was admittedly liable for the tax and was primarily interested in having the period for assessment extended in order that the protest against the additional tax might receive further consideration by the Commissioner. The waiver and protest accomplished the purpose sought in that the proposed tax was reduced from $211,227.75 (R. 53) to $43,527.25, the amount eventually determined in the deficiency notice (R. 9). We submit the affidavit of the respondent's president clearly indicates that the instrument was the act of the respondent and the purpose was to extend the time for the assessment of the respondent's transferee liability until the formal waiver of November 6, 1926, was filed.

The fact that the waiver was informal did not invalidate it. The statute does not prescribe the form of waivers, nor is statutory authority necessary to make a valid waiver. See *Aiken* v. *Burnet*, 282 U.S. 277; *Brown & Sons Co.* v. *Burnet*, 282

U.S. 283, *supra*. Nor did the fact that no time limit was specified invalidate the waiver. It bound the respondent at least for a reasonable time (*Pictorial Printing Co.* v. *Commissioner*, 38 F. (2d) 563 (C.C.A. 7th); *Frost* v. *Commissioner*, 23 B.T.A. 411, 416), and we submit that the ten months' period between the informal and formal waivers was reasonable.[6]

Unless the Commissioner's signature is necessary to the validity of a waiver, this informal waiver was, we contend, sufficient to extend the period for assessment until November 6, 1926, when the formal waiver was given, and for that reason Section 1106 (a) of the 1926 Act never became operative. The question of the necessity for the Commissioner's signature to validate a waiver is fully treated in the Government's brief in *Helvering* v. *United States Refractories Corp.*, No. 20, present term.[7] For the reason there stated, we respectfully urge that the failure of the Commissioner to sign did not invalidate the waiver.

We submit the waivers executed by the respondent were by themselves sufficient to extend the statutory period for assessment.

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[6] Under Bureau practice, most waivers run for a period of one year.

[7] The decision of the Circuit Court of Appeals in that case (64 F. (2d) 69) was affirmed by this Court on October 23, 1933, but by an equally divided court. The same question was also presented, but not decided, in *R. H. Stearns Co.* v. *United States*, No. 133, October Term, 1933, decided January 8, 1934.

II

THE EARLIER WAIVERS EXECUTED IN THE NAME OF THE CHEMICAL COMPANY WERE LIKEWISE BINDING ON THE RESPONDENT AND EXTENDED THE PERIOD FOR ASSESSMENT SO THAT THE STATUTE HAD NOT RUN WHEN THE DEFICIENCY NOTICE WAS SENT

Even if the Court should hold that the waivers executed by the respondent were not alone sufficient, then the Government relies on the series of waivers filed on behalf of the Chemical Company and executed by H. J. Schlesinger, its vice president. These waivers extended the statutory period to December 31, 1926. If construed as valid waivers of the Chemical Company, they extended the period for assessment against the transferor to a date less than one year prior to the deficiency notice, so that notice to the transferee was timely under Section 280 (b) (1) of the 1926 Act, (*infra*, p. 42). If construed as valid waivers binding on the respondent, they served to extend the period for assessment against the respondent so that the time had not expired when the last waiver of November 6, 1926, was given. These waivers were: (1) the unlimited waiver of December 15, 1920 (R. 55), expiring by order of the Commissioner on April 1, 1924 (Mim. 3085, II-1 Cumulative Bulletin 174); (2) the waiver filed February 26, 1924, extending the period for one year after the expiration of the waiver already on file or until April 1, 1925 (R. 132, 56–57); (3) the waiver of December 23,

1924, extending the period for one year after the expiration of any waiver on file or until April 1, 1926 (R. 132–133, 57–58); and (4) the waiver of January 12, 1926, extending the period to December 31, 1926. (R. 134, 61.)

The first of these waivers is concededly valid. On March 1, 1920, the Supreme Judicial Court of Maine entered its decree dissolving the Chemical Company. (R. 21.) Under Section 81 of the Revised Statutes of Maine (*infra*, p. 44), corporations whose charters expire or are otherwise terminated have a corporate existence for three years thereafter to settle their affairs. Thus, the court below recognized that the Chemical Company's first waiver, executed prior to the expiration of the three-year period, was valid. (R. 163.) However, the court held that the other waivers executed after the Chemical Company had ceased to exist were void. (R. 164.)

But even if the decree of the Maine court was valid and effected a dissolution of the Chemical Company so that three years thereafter it was incapable of executing waivers, still, we contend, this is not sufficient to establish that the waivers were of no effect. The record shows that through its officers and agents *the respondent* participated in procuring and filing these waivers, and under the circumstances we contend that the waivers, though executed in the name of the Chemical Company, should be held binding on the respondent, extend-

ing the period for the assessment of the respondent's transferee liability.

The respondent was the transferee of all the assets of the Chemical Company and it expressly assumed all the latter company liabilities. Both corporations were owned or controlled by the same individuals, all members of the Schlesinger family. (R. 34, 129–130.) In consideration of the transfer of the assets, the respondent issued its stock to the stockholders of the Chemical Company. (R. 129.) The members of the first board of directors of the respondent were also members of the last board of directors of the Chemical Company. (R. 25–26.) Thus there was a substantial identity in the two organizations.

The two companies together with some other affiliated corporations maintained common offices in a building in the City of Milwaukee. (R. 139.) Mail addressed to the Chemical Company after the decree of dissolution was taken in by the respondent as its successor in interest. (R. 31.)

The Newport Mining Company, another corporation controlled by the Schlesinger family (R. 129), was affiliated with the Newport Chemical Company (R. 128). The Newport Mining Company had been dissolved on March 1, 1920 (R. 21), and prior to its dissolution all of its assets were divided between the Steel and Tube Company of America and the resp ndent (R. 38). On or about August 7, 1923, the Commissioner notified the New-

port Mining Company, as parent, of a proposed deficiency against the Chemical Company in the amount of $116,065.49. (R. 39–45.) A protest against this determination was filed on behalf of the Newport Mining Company and the Chemical Company by Charles Fawsett, as general counsel of the Newport Mining Company. (R. 36–37.) Mr. Fawsett was counsel for the respondent. (R. 27.) He, together with others, was given powers of attorney by the respondent under dates of September 5, 1923, and January 30, 1925, to represent the respondent with respect to the tax liability of the Chemical Company. (R. 32–33.) The above protest signed by Mr. Fawsett was verified by H. H. Springford in his capacity as vice president of the respondent as well as a former officer of the Newport Mining Company. (R. 38.) Shortly prior to the filing of this protest H. J. Schlesinger, as vice president of the Mining Company, wrote the Commissioner under date of August 28, 1923, asking for a conference in connection with the proposed tax. It is significant that this letter was written on the respondent's letterhead. (R. 45–46.) From these facts it is evident that at this time the respondent was taking an active interest in the tax liability of its predecessor, the Chemical Company.

While the protest was being considered, the Commissioner under date of February 11, 1924, wrote the Mining Company asking for waivers. (R. 75–76.) In reply to this request the respondent's

secretary, C. W. Westerman, under the respondent's letterhead on February 23, 1924, sent the Commissioner waivers for all the affiliated companies, including one for the Chemical Company. (R. 63.) On February 26, 1924 the Commissioner received a 1917 waiver signed on behalf of the Chemical Company by H. J. Schlesinger as vice president. (R. 132, 56–57.) In view of the date of its receipt, there can be little doubt that this waiver was one of those mailed to the Commissioner by the respondent's secretary. This waiver, therefore, was one procured by and signed with the assent of the respondent. In view of the Commissioner's statement contained in his letter of February 11, 1924, that the period of limitations would expire April 1, 1924,[8] and that without an extension there would be insufficient time for careful consideration of the protest, it seems apparent that the waiver was given for the benefit of the respondent. This waiver extended the period to April 1, 1925.

Prior to the expiration of this waiver, the Commissioner on December 3, 1924, advised the Chemical Company (and it is to be remembered that the respondent received all mail addressed to the Chemical Company) of a tentative determination of a deficiency in the amount of $226,710.08. (R. 46–48.) A protest against this determination together with a new 1917 waiver of the Chemical

[8] It will be recalled that the unlimited waiver of December 15, 1920 (R. 55), which was concededly valid, expired April 1, 1924.

Company was mailed to the Commissioner on December 26, 1924, by Charles F. Fawsett, who signed as general counsel for the Chemical Company as well as numerous other companies mentioned in the letter. This letter was received in the Consolidated Returns Audit Division of the Bureau on December 31, 1924. (R. 52.) On the same date there was received in the same division a 1917 waiver filed on behalf of the Chemical Company by H. J. Schlesinger, vice president. (R. 132–133.) It is evident that this waiver was the one enclosed in the letter of Mr. Fawsett, and since he was counsel for the respondent after the Chemical Company was dissolved, we believe it is clear that in procuring and forwarding the waiver Mr. Fawsett was acting for the respondent as the sole party interested with respect to the Chemical Company's taxes. The protest mailed with the waiver was verified by A. A. Schlesinger, who was president of the respondent,[9] and who stated that he was duly authorized to make the verification. (R. 51.) The waiver accompanying this protest extended the period for one year from the expiration of waivers already on file, or until April 1, 1926.

While this waiver was in effect, the Commissioner made another tentative determination of a deficiency for 1917 against the Chemical Company

[9] While the record does not show that A. A. Schlesinger was president of the respondent on December 27, 1924, when the protest was executed, it does show that he was president in 1920 (R. 68) and in 1926 (R. 60).

in the sum of $211,227.75 and notified that company thereof under date of December 14, 1925. (R. 53–54.) To this the protest of January 11, 1926, referred to in Point I of this brief (*supra*, pp. 21–24), was filed. This constituted an informal waiver of the statute by the respondent. It was verified by the respondent's president, A. A. Schlesinger, and contained a statement that "the taxpayer hereby places on record its willingness to file all required waivers to permit of the final determination" of the exceptions taken to the proposed tax. (R. 60.) A few days later the last waiver of the Chemical Company was filed, extending the period for assessment to December 31, 1926. (R. 61.)

This last waiver, together with its predecessors, was sufficient to extend the statutory period for assessment in an unbroken chain to December 31, 1926. On November 6, 1926, the respondent executed its waiver as transferee, and within the time as extended by that waiver the deficiency notice was sent.

We submit the respondent was bound by all of these waivers. Through its officers and agents it participated in procuring and filing the waivers. Each waiver was filed in connection with a protest in which the respondent participated. The waiver of November 6, 1926, which was clearly the act of the respondent, was filed in connection with a similar protest and given under the same circumstances

which prompted the giving of the earlier waivers. It was but the last link in a chain of waivers, all designed to accomplish the same purpose. The respondent was liable for the tax and was the only party interested in securing an extension of time in order that careful consideration might be had of the various protests that it had caused to be filed. Under these circumstances, the waivers procured and filed by the transferee, though executed in the name of the transferor, should bind the transferee and be given the effect they obviously sought to accomplish. See *Phillips* v. *Lyman H. Howe Films Co.*, 33 F. (2d) 891 (C.C.A. 3d), *supra; Warner Collieries Co.* v. *United States*, 63 F. (2d) 34 (C.C.A. 6th), *supra*. See also *Monarch Mills* v. *Jones*, 59 F. (2d) 502 (C.C.A. 4th).

Moreover, as a result of procuring and filing the waivers in question, the respondent was afforded repeated reconsideration of the tax liability, resulting in a reduction of the deficiency from $116,065.49, the amount determined in 1923 (R. 39–45), to $43,527.25, the amount eventually determined in the deficiency notice (R. 9). This substantial reduction operated solely for the benefit of the respondent as the only party liable for the tax. Having obtained delay in assessment, a more deliberate consideration of the question, and a reduction of the deficiency, the respondent ought not to be heard to urge the bar of the statute. See *Warner Collieries Co.* v. *United States*, 63 F. (2d) 34 (C.C.A. 6th), *supra; Lucas* v. *Hunt*, 45 F. (2d) 781 (C.C.A.

5th), *supra; Trustees for Ohio and Big Sandy Coal Co.* v. *Commissioner,* 43 F. (2d) 782 (C.C.A. 4th); *Liberty Baking Co.* v. *Heiner,* 37 F. (2d) 703 (C.C.A. 3d); *Loewer Realty Co.* v. *Anderson,* 31 F. (2d) 268 (C.C.A. 2d). And see *Heiman Grocery Co.* v. *Crooks,* 44 F. (2d) 854 (W.D.Mo.), appeal dismissed, 50 F. (2d) 1077.

The court below thought there was no estoppel (R. 164), because the Board had found as a fact that the respondent had, on numerous occasions, prior to the expiration of the statutory period of limitations, informed the Commissioner that the Chemical Company had been dissolved (R. 143). But we are not contending that the respondent is estopped to deny the existence of the Chemical Company, but rather that the respondent is estopped to contend that the waivers procured by it are not binding on it. It is obvious that the waivers were not executed for the protection of the dissolved Chemical Company. It is just as obvious that they were intended to and did benefit the respondent. The Board found as a fact that the Commissioner knew of the dissolution of the Chemical Company. Therefore, the Commissioner must have accepted the waivers with the understanding that they were intended to bind the respondent. The respondent, having procured the waivers and benefited by the filing of them, is estopped to deny that it was not bound by them. *Warner Collieries Co.* v. *United States, supra,* is particularly in point. There the Wolf Run Coal Company had trans-

ferred all its assets to the Warner Company and then dissolved. Later the former officers of the Wolf Company who were then officers of the Warner Company executed waivers in the name of the dissolved company. It was there contended, as here, that the former officers were not authorized to act for the dissolved corporation and that the waivers were, therefore, invalid. In affirming the District Court, the Circuit Court of Appeals held (p. 35):

> We are of the opinion that appellant is not in a position to raise these questions. It is obvious that the execution of the waivers by Whitworth and Warner and the proceedings before the Board of Tax Appeals were not intended for the protection of the dissolved Wolf Company. It is just as obvious that they were intended to and did benefit the Warner Company, which these officials then represented, and that the use of the corporate name and seal of the Wolf Company, acquiesced in by the Commissioner, was nominal only, and fully understood to be so by the Commissioner. Appellant cannot therefore now assume a contrary and inconsistent position at the expense of the Government.

The decision of the court below was based solely on the ground that the waivers in question were invalid because they were executed after the Chemical Company had ceased to exist pursuant to the

decree of the Maine Supreme Judicial Court. In the preceding portion of this brief we have contended that this ground is not a sufficient basis for the disposition of this case, because some of the waivers were executed by the respondent itself, and the others, even though not binding on the Chemical Company, were effective and binding on the respondent. We also contend that the decision of the Maine court is not conclusive in this Federal tax proceeding.

The limitations applicable to the collection of Federal taxes are, we submit, governed by Federal law and not by state statutes or state court proceedings. In *Colonial Trust Co.* v. *United States,* 55 F. (2d) 512 (C.Cls.), certiorari denied, 286 U.S. 560, a waiver signed by an executor was held valid although under the law of the State in which the executor was appointed, it had no authority to waive the statute of limitations. A similar result was reached in *Aldridge* v. *United States,* 64 C.Cls. 424, where the court said (pp. 431–432) that Congress:

> had the power * * * to provide not only a statute of limitations but the right to waive the limitation, and this right was given to the taxpayer. It cannot be contended that the power of Congress to confer the right can be taken away by a State statute, much less by the decision of a State court.

See also *Davis* v. *United States,* 27 F. (2d) 630 (Maine); *Dodge* v. *Commissioner,* 13 B.T.A. 201.

In *California Iron Yards Co.* v. *Commissioner*, 47 F. (2d) 514 (C.C.A. 9th), a waiver executed on behalf of a suspended California corporation was held valid, although the California law provided a criminal penalty against anyone attempting to exercise the rights or powers of any delinquent corporation, and also provided that every contract made in violation of the statute should be void. See also *Monarch Mills* v. *Jones*, 59 F. (2d) 502 (C.C.A. 4th); *Concrete Engineering Co.* v. *Commissioner*, 58 F. (2d) 566 (C.C.A. 8th). Compare *Burnet* v. *Harmel*, 287 U.S. 103, 110.

So far as transferee liability is concerned, Congress has expressly provided in Section 280 (c) of the Revenue Act of 1926 (*infra*, p. 42) that:

> For the purposes of this section, if the taxpayer is deceased, or in the case of a corporation, has terminated its existence, the period of limitation for assessment against the taxpayer shall be the period that would be in effect had the death or termination of existence not occurred.

Congress has thus declared in express terms that the termination of the existence of a corporation under state law shall not affect the time within which transferee liability for Federal taxes must be assessed. As a consequence, therefore, the question of the validity and effect of the Maine decree is, we submit, immaterial, and the waivers in question were valid regardless of that proceeding.

But even if the Maine law were controlling in a Federal tax case, we contend that the Maine decree involved here was not effective to terminate the existence of the Chemical Company. The statutes of Maine provide that the Supreme Judicial Court upon application by bill in equity may decree the dissolution of a corporation and upon dissolving such corporation shall appoint one or more trustees, but upon proof that there are *no existing liabilities* and no existing assets requiring distribution among the stockholders, the court may dissolve the corporation without the appointment of trustees or receivers. Revised Statutes of Maine, 1916, c. 51, Sections 89, 90 (pp. 44–45, *infra*). Here the bill of the Chemical Company's stockholders recited that *there were* existing liabilities and no existing assets. (R. 19.) The corporation's answer admitted all the averments of the bill. (R. 20.) The decree recited that the cause was heard upon bill and answer, but, nevertheless, it was ordered that the corporation should be dissolved without the appointment of a trustee or receiver. (R. 21.) There was thus no provision made for the appointment of any person to collect or administer any corporate funds for the benefit of creditors despite the fact that it appeared on the face of the record that there were existing liabilities.

It would seem that under these circumstances the court had no jurisdiction or power to enter a decree of dissolution without the appointment of

trustees. It is made by statute a condition precedent to such a decree that there shall be no existing liabilities, and the record of the proceedings discloses on its face that the jurisdictional prerequisites for the decree were lacking. Where it appears that facts necessary for jurisdiction were absent, the judgment of a court is void and may be collaterally attacked. See *Thompson* v. *Whitman,* 18 Wall. 457; *Williamson* v. *Berry,* 8 How. 495; *Old Wayne Life Assn.* v. *McDonough,* 204 U.S. 8; *Simon* v. *Southern Railway,* 236 U.S. 115, 126–128. The same is true when it appears that the court did not have jurisdiction to grant the particular remedy which was given or where the remedy granted was without the scope of the prayer. See *Glover* v. *Brown,* 32 Idaho 426; *Sache* v. *Wallace,* 101 Minn. 169; *Cushman* v. *Warren-Scharf Asphalt Paving Co.,* 220 Fed. 857, 861 (C.C.A. 7th), certiorari denied, 238 U.S. 621. Likewise the judgment is void and subject to collateral attack where the court has jurisdiction of the subject matter and the parties but enters a judgment outside the power granted by law. See *United States* v. *Walker,* 109 U.S. 258, 266–267; *Bigelow* v. *Forrest,* 9 Wall. 339; *Windsor* v. *McVeigh,* 93 U.S. 274, 282–283.

Since the Maine court transcended in the extent and character of its decree the law which was applicable to it, the decree was void and ineffective to accomplish a dissolution. The failure to appoint a trustee or receiver is more than a mere procedural

defect. We submit, as the court held in *In re Wolf Mfg. Industries,* 56 F. (2d) 64, 66 (C.C.A. 7th), that

> if the corporation does not comply with the statute, so far as the rights of third persons are concerned, the dissolution is inoperative and void.

The present case is strikingly similar to *Elston* v. *Elston & Co.,* 131 Maine 149, recently decided by the Supreme Judicial Court of Maine, where it was held that a dissolution obtained under circumstances almost identical with those involved here was properly set aside at the instance of a creditor many years after the three years following the purported dissolution had elapsed.

CONCLUSION

The waivers involved were binding on the respondent and were effective to extend the statutory period for assessment so that assessment was not barred when the deficiency notice was mailed. The decision of the Circuit Court of Appeals should be reversed.

Respectfully submitted.

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JANUARY, 1934.

APPENDIX

Revenue Act of 1926, c. 27, 44 Stat. 9:

SEC. 274. (a) If in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect of the tax imposed by this title, the Commissioner is authorized to send notice of such deficiency to the taxpayer by registered mail. Within 60 days after such notice is mailed (not counting Sunday as the sixtieth day), the taxpayer may file a petition with the Board of Tax Appeals for a redetermination of the deficiency. Except as otherwise provided in subdivision (d) or (f) of this section or in section 279, 282, or 1001, no assessment of a deficiency in respect of the tax imposed by this title and no distraint or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such 60-day period, nor, if a petition has been filed with the Board, until the decision of the Board has become final. Notwithstanding the provisions of section 3224 of the Revised Statutes the making of such assessment or the beginning of such proceeding or distraint during the time such prohibition is in force may be enjoined by a proceeding in the proper court. (U.S.C. App., Title 26, Sec. 1048.)

SEC. 277. (a) Except as provided in section 278—

* * * * *

(3) The amount of income, excess-profits, and war-profits taxes imposed by the Act entitled "An Act to provide revenue, equalize duties, and encourage the industries of the United States and for other purposes," approved August 5, 1909, the Act entitled "An Act to reduce tariff duties and to provide revenue for the Government, and for other purposes," approved October 3, 1913, the Revenue Act of 1916, the Revenue Act of 1917, the Revenue Act of 1918, and by any such Act as amended, shall be assessed within five years after the return was filed, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period.

* * * * *

(b) The running of the statute of limitations provided in this section or in section 278 on the making of assessments and the beginning of distraint or a proceeding in court for collection, in respect of any deficiency, shall (after the mailing of a notice under subdivision (a) of section 274) be suspended for the period during which the Commissioner is prohibited from making the assessment or beginning distraint or a proceeding in court, and for 60 days thereafter. (U.S.C. App., Title 26, Sec. 1057.)

* * * * *

SEC. 278. (c) Where both the Commissioner and the taxpayer have consented in writing to the assessment of the tax after the time prescribed in section 277 for its assessment the tax may be assessed at any time prior to the expiration of the period agreed upon. (U.S.C. App., Title 26, Sec. 1060.)

SEC. 280. (a) The amounts of the following liabilities shall, except as hereinafter in this section provided, be assessed, collected, and paid in the same manner and subject to the same provisions and limitations as in the case of a deficiency in a tax imposed by this title (including the provisions in case of delinquency in payment after notice and demand, the provisions authorizing distraint and proceedings in court for collection, and the provisions prohibiting claims and suits for refunds):

(1) The liability, at law or in equity, of a transferee of property of a taxpayer, in respect of the tax (including interest, additional amounts, and additions to the tax provided by law) imposed upon the taxpayer by this title or by any prior income, excess-profits, or war-profits tax Act.

* * * * *

(b) The period of limitation for assessment of any such liability of a transferee or fiduciary shall be as follows:

(1) Within one year after the expiration of the period of limitation for assessment against the taxpayer; or

* * * * *

(c) For the purposes of this section, if the taxpayer is deceased, or in the case of a corporation, has terminated its existence, the period of limitation for assessment against the taxpayer shall be the period that would be in effect had the death or termination of existence not occurred.

(d) The running of the period of limitation upon the assessment of the liability of a transferee or fiduciary shall, after the mailing of the notice under subdivision (a) of

section 274 to the transferee or fiduciary, be suspended for the period during which the Commissioner is prohibited from making the assessment in respect of the liability of the transferee or fiduciary, and for 60 days thereafter. (U.S.C. App., Title 26, Sec. 1069.)

* * * * *

SEC. 283. (a) If after the enactment of this Act the Commissioner determines that any assessment should be made in respect of any income, war-profits, or excess-profits tax imposed by the Revenue Act of 1916, the Revenue Act of 1917, the Revenue Act of 1918, the Revenue Act of 1921, or the Revenue Act of 1924, or by any such Act as amended, the Commissioner is authorized to send by registered mail to the person liable for such tax notice of the amount proposed to be assessed, which notice shall, for the purposes of this Act, be considered a notice under subdivision (a) of section 274 of this Act. In the case of any such determination the amount which should be assessed (whether as deficiency or as interest, penalty, or other addition to the tax) shall, except as provided in subdivision (d) of this section, be computed as if this Act had not been enacted, but the amount so computed shall be assessed, collected, and paid in the same manner and subject to the same provisions and limitations (including the provisions in case of delinquency in payment after notice and demand and the provisions prohibiting claims and suits for refund) as in the case of a deficiency in the tax imposed by this title, except as otherwise provided in section 277 of this Act. (U.S.C. App., Title 26, Sec. 1064.)

* * * * *

SEC. 1106. (a) The bar of the statute of limitations against the United States in respect of any internal-revenue tax shall not only operate to bar the remedy but shall extinguish the liability; but no credit or refund in respect of such tax shall be allowed unless the taxpayer has overpaid the tax. The bar of the statute of limitations against the taxpayer in respect of any internal-revenue tax shall not only operate to bar the remedy but shall extinguish the liability; but no collection in respect of such tax shall be made unless the taxpayer has underpaid the tax. (U.S.C. App., Title 26, Sec. 1249.)

Revenue Act of 1928, c. 852, 45 Stat. 791, 875:

SEC. 612. REPEAL OF SECTION 1106 (a) of 1926 ACT. Section 1106 (a) of the Revenue Act of 1926 is repealed as of February 26, 1926.

Revised Statutes of Maine (1916), c. 51:

SEC. 81. *Existence after charter expires.* R.S., c. 47, § 77. Corporations, whose charters expire or are otherwise terminated, have a corporate existence for three years thereafter; to prosecute and defend suits; to settle and close their concerns; to dispose of their property; and to divide their capitals.

SEC. 89. *Bill in equity against corporations for dissolution; if no liabilities, dissolution may be had without trustees.* R.S., c. 47, § 80. Except where otherwise provided by statute, whenever at any meeting of its stockholders; legally called therefor, such stockholders vote to dissolve such corporation, a bill in equity against the same for dissolution thereof, may be filed by any officer, stockholder or creditor in the supreme judicial court, in the county in which it has an established place of business, or in which it

held its last stockholders' meeting; upon said bill, such notice shall be given as may be ordered by any justice of said court, in term time or vacation, and upon proof thereof, such proceedings may be had according to the usual course of suits in equity, that said corporation shall be dissolved and terminated. Upon proof that there are no existing liabilities against said corporation, and no existing assets thereof, requiring distribution among the stockholders, said court may dissolve said corporation without the appointment of trustees or receivers.

SEC. 90. *Jurisdiction of court; court may superintend collection and distribution of assets.* R.S. c. 47, § 81. Said court has jurisdiction in said cause to appoint receivers, issue injunctions, and pass interlocutory decrees and orders, according to the usual course of proceedings in equity; and shall, moreover, upon dissolving said corporation, or upon terminating its charter, appoint one or more trustees, who shall have all the powers conferred upon similar trustees by sections eighty-one, eighty-eight and ninety eight, or by any other law of the state, with such special powers as may be given them by said court. But, notwithstanding the appointment of such trustees, said court may superintend the collection and distribution of the assets of said corporation, and may retain said bill for that purpose.

SEC. 101. *Capital not be divided until debts paid.* R.S. c. 47, § 92. Corporations, not created for literary, benevolent or banking purposes, shall not so divide any of their corporate property as to reduce their stock below its par value, until all debts are paid, and then only for the purpose of closing their concerns.

U. S. GOVERNMENT PRINTING OFFICE: 1934

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No. 515.

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In the Supreme Court of the United States

OCTOBER TERM, 1933.

GUY T. HELVERING,
Commissioner of Internal Revenue,
Petitioner,

vs.

THE NEWPORT COMPANY,
Respondent.

On Petition for Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

REPLY OF THE RESPONDENT TO THE PETITION.

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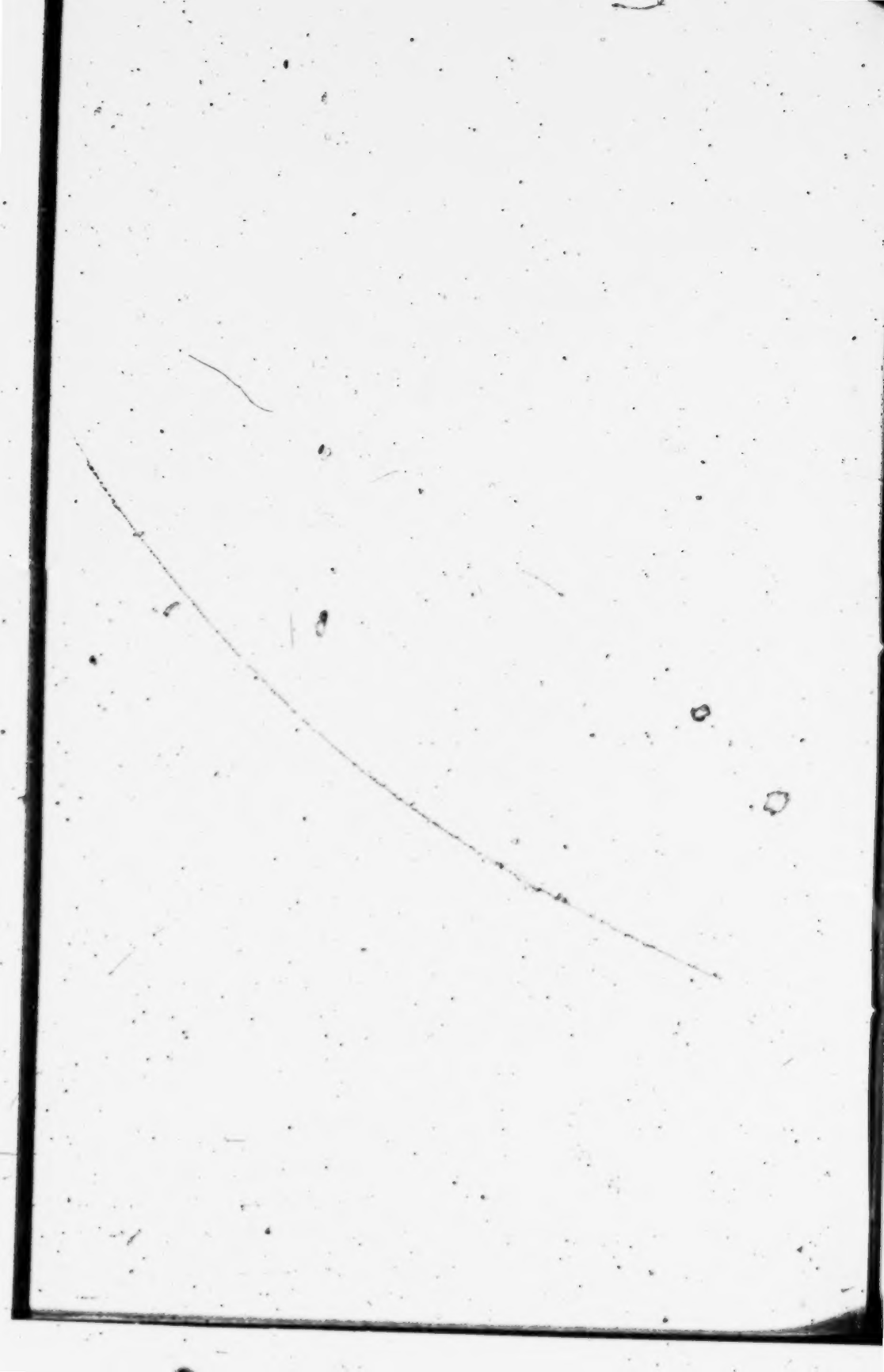

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In the Supreme Court of the United States

OCTOBER TERM, 1933.

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Commissioner of Internal Revenue,
Petitioner,

vs.

THE NEWPORT COMPANY,
Respondent.

On Petition for Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

REPLY OF THE RESPONDENT TO THE PETITION.

The questions raised in the petition (p. 2) will be answered under the following headings:

1. The decree of the Supreme Judicial Court of Maine dissolving the transferor was not void and is not open to collateral attack.

2. The instruments relied on as waivers were ineffectual to extend the period, or lift the bar of the statute of limitations.

3. The decision does not conflict with those referred to on pages 13 and 14 of the petition or any other decision that we know of.

I.

The decree of the Supreme Judicial Court of Maine dissolving the transferor was not void and is not open to collateral attack.

1. No question as to the validity of the decree was raised before the Board of Tax Appeals and the question was therefore not open to review in the appellate court.

As expressly stated in the record, a certified copy of the dissolution proceedings was received in evidence without objection (Rec. 18). One of the assignments of error on which the petition for review was based is that the Board erred in not expressly finding that the Chemical Company went entirely out of business and ceased to exist (Rec. 147). The only evidence in the case that it ceased to exist were the dissolution proceedings offered for that purpose and received without objection. The claim that the decree was void was evidently an afterthought. The petitioner should not be allowed to take inconsistent positions.

Questions not raised in the trial tribunal will not be considered on appeal,

Virtue vs. Creamery Package Mfg. Co., 227 U. S. 8; 33 S. Ct. 202, 208;
Walker vs. Sauvinet, 92 U. S. 90, 93;
Edwards vs. Elliott, 21 Wall., 532, 557, 558;
Wilson vs. McNamee, 102 U. S. 572, 574.

As stated in *Corpus Juris*, Vol. 3, Secs. 689, 693, while this rule

> "is supportable on a number of considerations, it is usually based on the ground that the opposite party should have the proper opportunity to avoid, by amendment or by supplying any defects in his proof, the effect of the objection."

The proceedings offered in evidence were not the originals but a certified copy. If it was essential to the validity of the proceedings that the *complaint* should have stated there were no liabilities, it might have been shown if the question had been raised that the apparent defect in the complaint was a clerical error in the certified copy.

2. If the question can be raised here, the validity of the decree is not open to collateral attack.

Notwithstanding the question was not raised before the Board of Tax Appeals it was fully considered by the court below and held to be without merit (Rec. 163). There can be no doubt of the correctness of that ruling.

Where the necessary parties are before the court and it has jurisdiction of the subject matter, it has authority to decide every question involved in the

proceedings, and its judgment whether right or wrong, is not open to collateral attack.

Hall vs. Law, 101 U. S. 461, 463, 464;
Harvey vs. Tyler, 2 Wall., 328, 342-346;
Vorhees vs. Bank of U. S., 10 Pet. 449, 472, 474, 478.

As held in *Harvey vs. Tyler,* the rule is the same whether jurisdiction is derived from the common law or conferred by statute.

The case involved the construction and application of a statute of the state. The necessary parties were before the court and it is conceded that the court was authorized in the proceedings before it to dissolve the corporation, but it is claimed that it should have appointed a trustee or receiver (Pet. p. 17). At most, that was mere error which did not go to the question of jurisdiction. Under the terms of the statute, whether a trustee or receiver should be appointed depended *not upon the complaint,* but upon the proof. As stated in 15 *Ruling Case Law,* Sec. 356, p. 878:

> "The general rule of law is that, when a court of competent jurisdiction has rendered a judgment in relation to any subject-matter within its jurisdiction, the presumption arises that it had before it sufficient evidence to authorize it to award such judgment, and where facts were required to be proved to confer jurisdiction that such facts were duly proved although the record is silent upon the matter."

The pleadings will be deemed amended, if necessary, to conform to the proof.

3. **The Supreme Judicial Court of Maine is the highest court of the state and its decision involving the construction and application of the statute of the state is the act of the state itself.**

Twining vs. New Jersey, 211 U. S. 78; 29 S. Ct. 14, 16.

There can therefore be no fatal variance between the terms of the statute and the construction and application thereof by the highest court of the state.

4. **The decree of the court recited that it appeared to the court that the defendant corporation had no debts and no assets** (Rec. 21).

This met the requirement of Section 101 of the statutes referred to and quoted on page 26 of the petition. There was no conflict between the terms of the decree and anything required by the statutes.

II.

The instruments relied on as waivers were without effect to extend the period or lift the bar of the statute of limitations.

The instruments that were relied upon as waivers by the petitioner in the court below, are referred to and correctly described in the opinion of the court (Rec. 161, 162). It is expressly stated in the petition that no claim is made for the first, December 15, 1920 which expired April 1, 1924 (Pet. 16).

Likewise, no claim is made for the second dated December 11, 1923, which is not referred to in the petition.

The third, undated, but bearing the stamp "Received February 26, 1924" the petitioner admitted in the court below did not extend the time for assessment beyond April 1, 1925 (Rec. 161, 162).

That leaves for consideration only the remaining four instruments referred to in the opinion beginning with the one dated December 23, 1924, and ending with the one dated November 6, 1926 (Rec. 162). Of these, the first two, the one dated December 23, 1924 and the other, January 12, 1926, were signed in the name of the Chemical Company by H. J. Schlesinger as vice-president who severed all connection with the respondent in the spring of 1922 and had no interest in it thereafter (Rec. 162).

The Chemical Company under the laws of Maine ceased to exist for all purposes March 1, 1923, three years after the date of its dissolution.

R. S. Maine, Chap. 47, Sec. 77;
Shore Line Road vs. Maine Central R. R., 92 Maine 476;
Carter vs. Stewart Drug Co., 115 Maine 289;
Oklahoma Natural Gas Co. vs. Oklahoma, 273 U. S. 257;
Crossman vs. Vivienda Water Co., (Calif.) 89 Pac. 335, 336, 337 and numerous authorities referred to therein.

With the exception of the instrument dated November 6, 1926, signed in the name of the respondent it is

not claimed by the petitioner that the instruments relied on were valid in themselves but that the respondent as transferee is estopped to deny their validity (Pet. 3).

We shall consider first, the instrument dated November 6, 1926, after the passage of the 1926 Act, assuming that the prior instruments referred to were invalid and without effect as waivers, and that further assessment of the Chemical Company was barred by the statute at the time of the passage of the 1926 Act.

1. **The instrument of November 6, 1926, was ineffectual to lift the bar of the statute.**

Since the petition was filed, the decisions referred to on page 15 of the petition involving the question of the retroactive effect of the repeal of Section 1106 (a) 1926 Act have been affirmed by this Court. Unless that question is to be reconsidered, it would seem unnecessary to consider further the above instrument. However, a contrary decision in those cases would not affect the result in this case, because:

(1) By the terms of the instrument dated November 6, 1926 it applied as a waiver only to taxes *then due* from the Chemical Company under any return filed by it for the years 1917 and 1918 and period ended June 20, 1919 (Rec. 62). If the prior instruments were invalid the liability of the Chemical Company for taxes was barred by the statute of limitations at the time of the passage of the 1926 Act, and by Section 1106 (a) was extinguished at the time of the execution of the instrument November 6, 1926, whether it was revived

by the subsequent repeal of Section 1106 (a) or not. There were thus no taxes *due from the Chemical Company* under its return for the year 1917 at the time of the execution of the instrument in question *and it therefore waived nothing,* even if the effect of the subsequent repeal of Section 1106 (a) was to revive a pre-existing liability. Such liability if revived by the repeal of Section 1106 (a) as of the date of its enactment, would still be subject to the bar of the statute *as it was at the time of the passage of the 1926 Act.* An instrument in writing purporting to waive legal rights must naturally be limited to the necessary legal effect of its terms, strictly construed. Assuming that it was the intent of Congress in repealing Section 1106 (a) as of the date of its enactment, to nullify that section as though it had never been enacted, *its enactment was none the less a fact,* and its terms and legal effect while it continued in force must be considered in determining the effect of the instrument here in question executed while it was in force. The effect of the instrument as a waiver must depend upon the intent expressed therein under the conditions existing at the time of its execution. The construction to be placed upon it cannot be affected by the intent of Congress in subsequently repealing Section 1106 (a). The intent of the instrument as expressed in its terms was to waive the time prescribed by law only for the assessment of taxes then due under the returns of the Chemical Company for the years referred to. The existence of Section 1106 (a) and its legal effect while it continued in force must, hence, be considered in determining what taxes were due under the return of the Chemical Company for the year 1917 at the

time of the execution of the instrument in question, *as by its terms it applied only to the assessment of such taxes then due.*

(2) The contract of the respondent to pay the liabilities of the Chemical Company applies only to its liabilities existing at the time of the contract. When those liabilities were once extinguished the obligation of the contract was discharged. The obligation of the contract once discharged could not be revived by statute even if Congress might re-impose the pre-existing tax liability on the taxpayer. The same must be true of the liability of the transferee at law or in equity independent of its contract. In either case the liability of the transferee once extinguished, could not be revived by Statute.

2. The respondent is not estopped to deny the validity of the prior instruments relied on as waivers.

The Board of Tax Appeals found against the claim of estoppel upon the facts of the case. It is the well settled rule that decisions of the Board on questions of fact will not be disturbed if supported by evidence.

The court below found upon a review of the record that the decision of the Board of Tax Appeals on the question of estoppel was supported by substantial evidence (Rec. 164). There is no explicit claim in the petition to the contrary and we assume that another review of the record on that question is not called for. No brief accompanied the petition which is little more than a general statement of the petitioner's claims.

The claim of estoppel rests upon the claim that the instruments executed as waivers for the Chemical Company after it had ceased to exist were procured by the respondent. The references in the petition to the record in support of the claim are wholly insufficient to establish any such claim (Pet. 17). On the other hand it is completely negatived by other parts of the record. If we may consider briefly the evidence referred to in support of the claim:

(1) The first is to the effect that mail addressed to the Chemical Company after it was dissolved would naturally be received by the respondent (Rec. 32-33).

That in itself would not, of course, make the respondent responsible for instruments executed in the name of the *Chemical Company* by one having no interest in or connection with the respondent.

As stated above, all of the instruments executed as waivers in the name of the dissolved *Chemical Company* after it had ceased to exist were signed by H. J. Schlesinger as its vice-president. H. J. Schlesinger *at the time of signing these instruments had no interest in or connection with the respondent.* He sold out all of his interest in the respondent in the spring of 1922 and thereafter had no connection with it (Rec. 28). He did, however, have a personal interest in the determinations of the tax liabilities of both the Newport Mining Company and the Chemical Company. Both of these companies were dissolved at the same time (Rec. 21) and prior to their dissolution both

transferred all of their assets (Rec. 38, 17) leaving their stockholders liable as transferees for any deficiencies in tax that might be found against them as dissolved corporations.

Regulations 69, Article 1291, 1926 Act;
Updike vs. U. S., 8 Fed. (2d) 913;
Cook on Corporations, (8th Ed.) Vol. 3, Sec. 673.

H. J. Schlesinger was one of the five owners (stockholders) of both of the dissolved companies (Rec. 34). He was, therefore, liable as a transferee of the dissolved Chemical Company notwithstanding the Newport Company may also have been liable. As said in Cumm. Bull. V-2, p. 79 (July to December, 1926), Opinion General Counsel, Bureau of Internal Revenue:

> "Although in all probability the government may sue under the contract of sale executed by the two corporations whereby the O company assumed to pay the debts of the M company, this should be considered as a secondary remedy, since it may be used, subject to the bar of the statute of limitations, after the remedies against the M company may have been exhausted. A taxpayer may not, by a contract providing that a third person pay its taxes, force the government to collect from such third person."

The tax liabilities of the Mining Company for the year 1917 were involved with those of the Chemical

Company under the consolidated return filed by the Newport Company in which the Chemical Company was included as an affiliated company (Rec. 18, 128, 129). As a transferee of the Newport Mining Company H. J. Schlesinger as one of its stockholders was liable for any deficiency in tax found against the dissolved corporation. His active interest in the determination of the tax liabilities of the Newport Mining Company and its affiliated companies in which were included the *Chemical Company* is shown by his letter to the Commissioner signed by him in the name of the then dissolved and extinct Newport Mining Company August 28, 1923 (Rec. 45-46).

H. J. Schlesinger is thus shown to have had a personal interest of his own in the tax liabilities of the *Chemical Company* amply sufficient to explain his execution of the several instruments in its name, independent of any interest the respondent may have had in the matter. The record shows that he was present throughout the hearing before the Board of Tax Appeals under subpoena as a witness for the government, *but was not placed on the stand or called upon to explain his execution of the various instruments in the name of the Chemical Company after it had ceased to exist* (Rec. 64).

(2) The next of the references relate to a protest of the Newport Mining Company in October 1923 against a determination by the Commissioner of the tax liabilities of itself and affiliated companies for the year 1917 (Rec. 36-39).

The only connection of the respondent with that instrument shown by the record is in the verification of it in which the affiant stated that all of the assets of the Newport Mining Company in whose name the appeal was taken were transferred to and divided between the Steel and Tube Company of America and the Newport Company on or about July 31, 1919 and thereafter "in the early part of the year 1920 said the Newport Mining Company was dissolved." That at the times referred to the affiant was an officer of the Mining Company and was at the time of the affidavit the vice-president of the Newport Company and president of the Steel and Tube Company of America, and that he was verifying the appeal in these several capacities (Rec. 38).

At the time of that protest and appeal, *October, 1923,* the one valid waiver given by the Chemical Company, December 15, 1920, while it was still in existence and could give a waiver, was in force and did not expire until April 1, 1924. That the respondent joined in the verification of that instrument cannot charge it with responsibility for subsequent protests or waivers given in the name of the *Chemical Company* after it had ceased to exist and the period for any further assessment had expired and with which it (the respondent) had nothing to do.

(3) The next relates to another protest of the Newport Mining Company, in December, 1924 (Rec. 48-52).

There is no reference to the Newport Company in the protest here referred to, or in the letter shown on

page 52 of the record in which it was transmitted to the Commissioner. The instrument referred to purported to be a protest of the Newport Mining Company and the Dunn Iron Mining Company on the ground that in the redetermination by the Commissioner of their tax liabilities referred to therein, their affiliation with the Chemical Company was denied (Rec. 49). As bearing upon the claim that the respondent was in any way involved in the proceeding, it is significant to note that it was stated in the instrument referred to that the *Chemical Company* was filing a separate protest of even date for itself on the same ground (Rec. 50). The letter of the attorney enclosing the protest of the two mining companies stated that *a protest of the Chemical Company was also enclosed* (Rec. 52).

The protest of the *Chemical Company* which was presumably on file and in the hands of the Commissioner at the time of the hearing before the Board, *was not offered in evidence.* The inference must be that it did not support the claim of the Commissioner that the respondent was responsible for it or in any way connected with it or other enclosures in the letter.

(4) The next and last relates to an instrument purporting to be a protest of the Chemical Company (Rec. 58-60, 53).

That instrument while purporting in the body thereof to be a protest of the Chemical Company, was not signed or executed by any one but was verified as to its contents by an attached affidavit made by A. A. Schlesinger who stated that he was the vice-presi-

dent and treasurer of the Chemical Company *until its dissolution in the year 1920* prior to which it had transferred all of its assets to the Newport Company and that at the time of the affidavit he was president of the Newport Company in active, charge, management and direction of its affairs; that he had read the protest to which his affidavit was attached and that the same was true to the best of his knowledge, information and belief (Rec. 60). As will be noted, the affidavit referring to the unsigned instrument to which it was attached, does not state that the verification was made by the affiant *as the president* of the Newport Company. It merely states *the fact* that he was at the time of the affidavit its president and in active charge of its affairs. There is no statement in the affidavit that it was made by the authority of the respondent. There is nothing in the affidavit *inconsistent with a positive refusal of the respondent* to have anything to do with the unsigned instrument to which it referred. It was treated by the Board of Tax Appeals in its findings *"as a protest made by A. A. Schlesinger purporting to be made* on behalf of the Chemical Works." (22 *B. T. A.* 843.)

It is stated in the body of the instrument that the sole basis of the protest is the refusal of the Commissioner to allow the affiliation of the Chemical Company with the Newport Mining Company and that the latter joins in the protest (Rec. 59). A. A. Schlesinger who made the affidavit attached to the instrument was also one of the five owners (stockholders) of both the Chemical Company and the Mining Company at the time of their dissolution (Rec. 34) and had the same personal interest in the determination of the

tax liabilities of the two companies as H. J. Schlesinger who signed the various instruments in the name of the Chemical Company after it had ceased to exist. A. A. Schlesinger was on the stand as a witness on the hearing before the Board (Rec. 26-31), but was not asked to testify as to whether he was acting for the Newport Company or for himself in verifying the instrument in question. There is no evidence that the unsigned protest was acknowledged by the Commissioner or that he relied upon it or paid any attention to it.

According to a ruling of the Department then in force, C. B. III-2, p. 286:

> "The letter of protest and briefs of argument filed with he Income Tax Unit as authorized by Treasury Decision 3616 (pp. 275, 278) must be signed by the taxpayer or his duly authorized agent or attorney.
>
> The statements of fact relied upon by the taxpayer in support of his protest must be furnished in the form of an affidavit and signed by the taxpayer. The affidavit will not be accepted under any circumstances if signed by taxpayer's attorney or other representative. Statements of fact by disinterested persons submitted by the taxpayer in support of his protest should be in the form of an affidavit."

It is well established that estoppel is not favored in the law and to establish it, all of its essential elements must be proved with particularity and precision *and that nothing can be supplied by inference or intendment.*

Standard Sanitary Mfg. Co. vs. Arrott, (C. C. A. 3rd Cir.) 135 Fed. 750, 757;
10 *Ruling Case Law,* p. 845, Sec. 150 and numerous decisions there referred to;
Grouf vs. State National Bank, (C. C. A. 8th Cir.) 40 Fed. (2d) 2, 7;
Central Improvement Co. vs. Cambria Steel Co., 210 Fed. 696, 718;
Brant vs. Virginia Coal & Iron Co., 93 U. S. 326, 335.

It is manifest that the evidence referred to in the petition is insufficient to establish an estoppel as against the respondent, and a review of the entire record would show that it contains practically no evidence that meets the requirements of evidence to establish estoppel.

On the contrary the undisputed evidence shows there is no basis for the application of the doctrine as matter of law.

It is conceded in the petition that the Commissioner received notice in connection with the Chemical Company's tax returns for the year 1919 and 1920 *that the company was dissolved* (Pet. p. 6). The record shows that he received the same notice with reference to the year 1917. In response to the questionnaire referred to on page 5 of the petition the Commissioner in a letter to the respondent dated August 10, 1921 requested full information under oath as to the dissolution of the companies referred to in the questionnaire, the Newport Mining Company and the Chemical Company, including the dates of the cancellation of their charters, and as to the status of the companies referred to

during the years 1917 and 1918 (Rec. 65, 66). The information required was furnished by the respondent in its letter of August 26, 1921, in which the affidavit of its secretary was enclosed (Rec. 66, 67). Thereafter, July 17, 1922, in a letter to the respondent, the Commissioner again referred to the questionnaire and to the consolidated income and profits tax returns filed by the respondent for the years 1919 and 1920 in which reference was made to the dates of the dissolution of the *Chemical Company* and the *Mining Company*, with a ruling based thereon with respect to their affiliations to the date of their dissolution and thereafter (Rec. 71-73). As said in the decision of the Board of Tax Appeals:

> "The evidence discloses that the petitioner" (the respondent here) "on numerous occasions prior to the expiration of the statutory period of limitations informed respondent" (the Commissioner) "that the Newport Chemical Works Inc. had been dissolved.
>
> 22 *B. T. A.* 846.

There is no claim in the petition that the Commissioner did not have full knowledge that the Chemical Company had been dissolved *in the year 1920* during the *period from 1924 to 1926,* inclusive, when he was asking for and accepting waivers signed in its name by one who had no interest in or connection with the respondent.

Where the essential facts were known to the party setting up the estoppel there can be no estoppel.

Hirning vs. National Reserve Bank, (C. C. A. 8th Cir.) 52 Fed. (2d) 382, 388 and numerous cases there cited.

Pomeroy's Equity Jurisprudence, 3rd Ed. Sec. 810;

Fellows vs. National Can Co., 257 Fed. 970, 977; certiorari denied 250 U. S. 662.

Neither the Chemical Company nor the Newport Mining Company filed any income tax return after their returns for the year 1920 in which the Commissioner was advised of their dissolution. The Commissioner should at least have been put on inquiry as to whether instruments purporting to be waivers, for the year 1917, executed in the name of the Chemical Company in the years 1924, 1925 and 1926, were executed with any authority. *There is no evidence in the record that he made any inquiry.*

Speaking of equitable estoppel, this court in *Brant vs. Virginia Coal & Iron Co.,* 93 U. S. 326, 335:

> "For the application of that doctrine there must generally be some intended deception in the conduct or declaration of the party to be estopped, or such gross negligence on his part as to amount to constructive fraud, by which another has been misled to his injury. In all this class of cases * * * the doctrine proceeds upon the ground of constructive fraud or of gross negligence, which in fact implies fraud."

The Board of Tax Appeals found that there was no deception practiced by the respondent.

22 *B. T. A.* 846.

As said in *Standard Sanitary Mfg. Co. vs. Arrott,* (C. C. A. 3rd Cir.) 135 Fed. 750, 756-757:

> "In the absence of expressly proved fraud, there can be no estoppel based upon the acts or conduct of the parties sought to be estopped, where such conduct is as consistent with an honest purpose or with an absence of negligence, as with their opposites."

With the knowledge that the Commissioner had of the facts, his action in continuing to ask for and accept waivers after the taxpayer corporation had gone out of existence can only be explained on the ground of a mistake of law.

It is said in the petition, "The respondent was the real party in interest and received the benefit of the reconsideration given to the tax liability of the Chemical Company (p. 17).

Assuming that to be so, that in itself would not be sufficient to work an estoppel against it. The elements of an estoppel are well established.

To constitute an estoppel, the party claiming to be estopped must be misled as to the facts and the party to be estopped must in some sense be responsible therefor.

Grouf vs. State National Bank, (C. C. A. 8th Cir.) 40 Fed. (2d) 2, 7.

Bigelow on Estoppel, 634, 635.

As pointed out above, H. J. Schlesinger who executed the instruments in question was also *a real party in interest* in the determination of the tax liabilities of the *Chemical Company* while he had no interest whatever in the respondent.

It was not necessarily *for the interest* of the respondent because it had agreed to pay the tax liability of the *Chemical Company* that the period within which the Commissioner was required by law to determine them should be extended over a period of nearly ten years. It is of some importance to a corporation to know its liabilities and so be able to make financial statements that can be relied on. The respondent as a transferee had the right to assume that it could successfully defend against an excessive assessment of its transferor. (*Wayne Body Corporation vs. Commissioner*, 23 B. T. A. 401, 411.) There could be no jeopardy assessment or other assessment against it as a transferee prior to the 1926 Act. That all of the proposed assessments *including that proposed in the 60 day letter*, were excessive and might have been successfully defendant against is shown by the fact that they varied from $226,710.08 (Rec. 46) down to $43,527.25 (Rec. 9). That the last, (proposed in the 60 day letter March 14, 1927), was still erroneous and excessive is shown by the fact that on the hearing before the Board of Tax Appeals it was voluntarily reduced $11,333.69, bringing the amount claimed down to about $32,000. (Rec. 17). More than ten years had then elapsed since the return was filed, and the taxpayer corporation had been dissolved and out of business for almost as long. The statute of limitations,

under the circumstances, was the natural and proper defense for the transferee. The limitation provision embodied in the revenue acts should be liberally construed in favor of the taxpayer.

U. S. vs. Updike, 281 U. S. 489, 496.

III.

The decision of the court below is not in conflict with the decisions referred to on pages 13 and 14 of the petition.

In *Phillips vs. Lyman H. Howe Films Co.*, 32 Fed. (2d) 891, there was a statutory merger of the corporate entities of the companies involved.

In this case there was no merger of corporate entities. The transaction was one of purchase and sale between the two corporations.

Woodley Petroleum Co. vs. Commissioner, 16 B. T. A. 253, 256.

The transaction was in the middle of the year 1919. The Chemical Company continued without change in its corporate existence until March 1, 1920, when it was dissolved. Its corporate existence continued for three years thereafter.

The separate legal entities of corporations cannot be disregarded, for purposes of taxation, however their stock may be held.

Planters Cotton Oil Co. vs. Hopkins, 286 U. S. 332; 52 S. Ct. 509;

Burnet vs. Clark, decided December 12, 1932, 53 S. Ct. 207, 209.

Burnet vs. Commonwealth Improvement Co., decided December 12, 1932, 53 S. Ct. 198, 199.

In *Lucas vs. Hunt,* 45 Fed. (2d) 781, Hunt, the former president of a dissolved corporation who was himself the transferee of its assets signed a waiver for the corporation after it had ceased to exist without notice to the Commissioner that it had been dissolved. The court held he was estopped to deny the validity of the waiver that he signed and upon which the Commissioner acted and relied.

Warner Collieries Co. vs. U. S., 63 Fed. (2d) 34, was a suit in equity brought in the District Court, against the Collieries Company to recover against it as a transferee, a deficiency in tax as finally determined by the Board of Tax Appeals against its transferor. The ground of the decision was that the appeal to the Board of Tax Appeals was taken in the name of the dissolved transferor company against which the assessment was made and carried to conclusion without the question of its dissolution or the bar of the statute of limitations being raised. It was found by the District Court as a fact and not questioned in the appellate court, that the party who prosecuted the appeal in the name of the dissolved corporation was the Collieries Company, the transferee; that it paid the expenses of the appeal and conducted and controlled the proceedings throughout. The court held

that the Collieries Company thereby became a party to the proceedings before the Board of Tax Appeals and as such was bound by the order of the Board affirming the assessment and determining the deficiency and could not be heard to question its validity proceedings. The grounds of the decision were stated in the opinion of the District Court, as follows:

> "No objection based on the statute of limitations, extinguishment of liability under section 1106(a), Revenue Act 1926, or invalidity of the waivers was made before the Board of Tax Appeals. In due course both proceedings were closed by stipulations signed by counsel. • • •
>
> "The conclusion that the orders of the Board of Tax Appeals were binding on the Collieries Co. disposes of its defenses that the waivers were invalid, the statute of limitations prevented assessment or collection of the additional taxes, the tax liability was extinguished, and the Board without jurisdiction because the deficiency letters proposed assessment against a non-existing corporation. Those questions, including alleged invalidity of some of the waivers because they were not signed on the part of the commissioner by one with authority to use his name, should have been raised before the Board and its decision reviewed." (Citing cases.) "The orders of the Board are final. • • •".
>
> "Upon receipt of the notices from the commissioner the trustees of the Wolf Run Co. or

the Warner Collieries Co. might have filed petitions with the Board in their own name, for both were liable to the government and were 'taxpayers' *U. S. vs. Updike,* and *Routzhan vs. Tyroler, supra.* In such proceedings the bar of the statute, extinguishment of liability, and validity of waivers, were matters necessarily involved in determining the existence of any deficiency. Sec. 906 (e) and 1106 (a) Rev. Act. 1926. They could have been raised without admitting existence of the Wolf Run Co.'s

Prentice-Hall Service 1931, Par. 821 (apparently not officially reported).

It is obvious that the facts upon which these cases were decided bear no resemblance to the facts in the instant case and that there is no conflict.

The Court is informed in the petition that there are certain other cases now pending before the Court of Appeals for the Seventh Circuit which it is said involve some of the questions involved in this case. As to that we can only say that the record in those cases is not before the Court, and they will doubtless receive the required attention if and when they come before it.

In conclusion, it is submitted that the petition should be dismissed.

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No. 515

In the Supreme Court of the United States

October Term, 1933.

GUY T. HELVERING, Commissioner of Internal Revenue, Petitioner,

vs.

THE NEWPORT COMPANY.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

BRIEF FOR THE RESPONDENT.

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No. 515

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GUY T. HELVERING, Commissioner of Internal Revenue, Petitioner,

vs.

THE NEWPORT COMPANY.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

BRIEF FOR THE RESPONDENT.

STATEMENT OF THE CASE.

The statement in the brief for the petitioner omits some of the most important facts and does not fairly present the case. As questions of fact are raised which call for a review of the entire record, we ask leave on behalf of the respondent to make a full statement of

the facts in proper sequence, instead of attempting to supplement the statement of the petitioner. The statement which follows is intended to include all material facts.

STATEMENT OF FACTS.

In the year 1919 the Newport Mining Company organized under the laws of *Maine*, the Dunn Iron Mining Company organized under the laws of *Wisconsin*, the Newport Chemical Company organized under the laws of *Maine*, and the respondent organized under the laws of *Delaware*, and certain other corporations were all owned and controlled by the same five individuals, Ferdinand Schlesinger, Mathilde Schlesinger, his wife, Armin A. and Henry J. Schlesinger, sons, and Gertrude MacLaren, daughter (R. 34, 36).

About July 31, 1919, all the assets of the Newport Mining Company were transferred to and divided between the Steel and Tube Company of America, another corporation (State of incorporation and stock ownership not shown), and the respondent (R. 38). The nature of this transaction *or the consideration paid by the transferees for the assets so received is not shown.* About the same time (precise date not shown) the *Newport Chemical Works Inc.*, referred to herein as the taxpayer and hereafter called the Chemical Company, transferred its assets to the *respondent* in consideration of the issuance of its stock to the stockholders of the *Chemical Company* and the assumption of all the liabilities of that Company (R. 17); and the *Gogebic Steel Company*, an Indiana corporation (R. 34, 36), and *Western States Coke Company* (State of incorporation or stock ownership not

disclosed), likewise transferred their assets to the respondent upon the same terms (R. 15). Thereby the stockholders of the *Chemical Company* in exchange for their stock became the holders of stock in a corporation (the respondent herein) organized *under the laws of another state* with assets which included the assets of the Chemical Company, but also other assets. There is no evidence in the record *that the respondent succeeded to or carried on the business of the Chemical Company,* or that it was authorized to do so under its charter. The charter of any of the companies or anything to show the purposes for which any of them was organized, was not offered in evidence.

The Newport Mining Company (hereafter called the Mining Company), the *Chemical Company* and the Dunn Iron Mining Company, were affiliated corporations (R. 17, 36). The Mining Company filed a consolidated return for the year 1917 in which was included the returns of the Dunn Iron Mining Company and the Chemical Company as affiliated companies. The Chemical Company originally had filed a separate return which was later included in the consolidated return of the Mining Company for excess profits taxes (R. 18, 128, 129). The return was filed April 1, 1918 (R. 18).

On March 1, 1920, following the transfer of all their assets in the middle of the year 1919, the *Mining Company* and the *Chemical Company* were dissolved by decrees of the Supreme Judicial Court of Maine, by suits in equity in accordance with the practice in equity, as authorized by a statute of the state (R. 19, 21). Their corporate existence was continued thereafter by statute, for three years, to settle and close their affairs (Rev. Stat. of Maine 1916, Chap. 51, Sec. 81). It was

conceded that they continued in business up to the time of their dissolution March 1, 1920 (R. 21, 22).

As stated above, the *respondent*, the *Chemical Company*, and the *Mining Company* were owned or controlled by the same persons at the time of the transfers above referred to and of the dissolution of the transferors. *The identity of interest between the five persons named and the respondent which existed at the time of the transfers, did not continue after the year 1922.* In that year *H. J. Schlesinger* one of the five who had owned or controlled all three corporations, sold out all of his interest in the *respondent* and thereafter had no connection with it (R. 28). *This fact is omitted from the petitioner's statement.* There is no evidence that the other four retained any interest in the *respondent Company* after that time, except as may be inferred from the fact that A. A. Schlesinger was its president in the year 1926 (R. 60, 62). What his stock interest was then, or previously, is not shown.

The period prescribed by the statute for making any assessment of the Chemical Company expired *March 1, 1923.* An unlimited waiver had, however, been executed by it December 15, 1920, before it went out of existence, signed E. G. Wilmer, vice-president, the validity of which, while it lasted, is not questioned. It is admitted that it lasted only until *April 1, 1924,* when it was terminated by proclamation of the Commissioner issued April 11, 1923 (R. 161; Pet. Br. 29).

The *first claim of any deficiency in tax* against the Chemical Company was made in *August 1923,* in a 30 day letter of the Commissioner addressed to the *Newport Mining Company* based upon an examination of

its consolidated return in which the return of the *Chemical Company* was included as an affiliated company (R. 39, 46). The total deficiency proposed to be assessed against the Mining Company and *its affiliated companies* was $578,335.17 of which the amount proposed to be assessed against the *Chemical Company* was $116,065.49. The claimed deficiency for the Mining Company alone, was $187,966.47 (R. 45). To that letter *H. J. Schlesinger who had then no interest in the respondent* and no connection with it, replied August 28, 1923, as follows:

"Commissioner of Internal Revenue,
Washington, D. C.

Reference IT:NR:G:EFS-5

Dear Sir:

Referring to your letter and accompanying report of August 13, 1923, in which we are advised of an additional assessment of The Newport Mining Company and its subsidiaries to the amount of $578,335.17 and are allowed thirty days within which to file exceptions, it is not clear to us from the report as to how the basis of the tax with respect to some of the most important items was arrived at, and it is necessary to enable us to prepare the proper exceptions to obtain some further information as to the basis of the tax.

Will you, therefore, please advise us of the earliest date that a brief conference can be ar-

ranged for at which time our representative may obtain the additional information required. As considerable work will have to be done to properly present our exemptions [exceptions] and the time is limited, may we ask you to kindly answer at once by wire at our expense or by return mail.

Very truly yours,

THE NEWPORT MINING COMPANY
By H. J. Schlesinger,
Vice-President."

(R. 45, 46.)

Following that letter, in October, 1923, an appeal was taken in the name of the *Newport Mining Company* from the letter of the Commissioner referred to in the letter of H. J. Schlesinger (R. 35, 38). The appeal was signed "The Newport Mining Company by Charles F. Fawsett, General Counsel." The Commissioner was advised in the *verification* that the *Newport Mining Company* was dissolved *in the early part of the year 1920,* at which time it had transferred all of its assets to the *Steel and Tube Company of America,* and the respondent. The verification was by H. H. Springford as Vice-president of the dissolved Mining Company *up to the time of its dissolution,* and as the then president *of the Steel and Tube Company of America,* and vice-president of the *respondent* (R. 38). It was stated in the instrument that the appeal was taken by the *Newport Mining Company* for itself and on behalf of each of its *affiliated companies* referred to in the 30 day letter. The affiliated companies re-

ferred to, eleven in number, were set out in the appeal among which was the *Chemical Company* (R. 36). Following the appeal an instrument purporting to be a waiver for the *Mining Company* and *its subsidiaries* was executed *December 11, 1923*, in the name of the *Newport Mining Company* by H. J. Schlesinger as Vice-president *and signed by the Commissioner* (R. 56). This instrument is omitted from the petitioner's statement of the facts and is not referred to in his brief. It is inserted as *the initial waiver* executed by *H. J. Schlesinger* for the *Chemical Company* as one of the Affiliated Companies of the *Mining Company*. At that time the *Mining Company* and also the *Chemical Company* had ceased to exist, their corporate existence having terminated under the Maine statute March 1, 1923. At the time of the execution of that instrument the Commissioner, who accepted and signed it, *had notice of the dissolutions of both companies* and of the date thereof, as shown by the following:

In the corporations' questionnaire, filed by the respondent *April 14, 1920*, the Commissioner was informed that both the Chemical Company and the Mining Company *were in process of dissolution during 1919 and that their stock had been cancelled* (R. 68). In the return of the *Chemical Company* filed March 8, 1921 for the year 1920 he was informed that the Company was no longer active and had no income for the year 1920, and in the letter enclosing the return he was told, *"You will further note that the company's affairs have been wound up and the company legally dissolved"* (R. 64, 54; Italics ours). *No return was filed by or for the company thereafter.*

In a letter dated August 10, 1921, addressed to the respondent the Commissioner referred to the state-

ment in the corporations' questionnaire to the effect that *both the Chemical Company and the Mining Company were in process of dissolution and their stock cancelled in the year 1919* and requested to be informed of the exact dates of the surrender of their respective charters, and of the status of the companies *in the years 1917 and 1918* and if the same conditions did not obtain in those years that he be given *complete information as to their status in those years,* and that the information requested be furnished in affidavit form (R. 65). The respondent replied August 26, 1921, giving in full detail the information requested, verified by its secretary in which the date of the dissolution of the *Chemical Company* and the Mining Company was given as March 1, 1920. The affidavit further stated that they were in process of dissolution from and after July 30, 1919 and the interval between that date and the date of the decree of dissolution March 1, 1920, was necessary to accomplish transfers of the property and the legal formalities in connection with their dissolution (R. 66, 67). June 17, 1922, in another letter to the *respondent* the Commissioner again referred to the corporations' questionnaire filed by respondent for the year 1919, and to its consolidated income and profits tax returns for the years 1919 and 1920, and advised it that the *Chemical Company* should be included in the consolidated return for the year 1920 *"to date of dissolution, March 1, 1920,"* and that the *Newport Mining Company* from July 1, 1919, *to the date of its dissolution March 1, 1920,* was not affiliated with respondent and should file a separate income and profits tax return for that period (R. 71, 73). The respondent replied in a letter dated July 27, 1922, in which it stated, *"Newport Chemical*

Works Inc. (Maine) to date of dissolution, March 1st, 1920, has not been included in the return for 1920 for the reason that this Company transacted no business whatsoever during the year" (R. 74). In the verification attached to the appeal of the *Newport Mining Company* for itself and subsidiaries in October, 1923, as before stated, the Commissioner was expressly informed that the company had been dissolved in the early part of the year 1920 (R. 38).

With this information of the dissolution of both the *Mining Company* and the *Chemical Company* before him or on file in his office, the Commissioner on the *11th of February, 1924,* addressed a letter to the *Newport Mining Company,* referred to its appeal of October, 1923, and stated that waivers executed by it had been received, but he desired waivers *for its subsidiaries, thirteen in number,* named in the letter, one of which was the *Chemical Company.* The instruments he desired executed, *16 forms of waivers,* were enclosed (R. 75, 76). The instruments offered in evidence as waivers each had attached the statement:

> "If this waiver is executed on behalf of a corporation, it must be signed by such officer or officers of the corporation as are empowered under the laws of the State in which the corporation is located to sign for the corporation, in addition to which, the seal, if any, of the corporation must be affixed" (R. 132, 133, 134, 136).

In reply to that request which was addressed, as stated, *not to the respondent,* but to the *Newport Mining Company,* a number of the instruments called for

were returned presumably executed, in a letter dated February 23, 1924, written on stationery of the respondent, signed "*C. W. Westerman, Secretary*" (R. 63). It was admitted that Mr. Westerman was the secretary of the respondent at the date of the letter (R. 64). There was, however, no evidence offered that he was authorized by the *respondent* to transmit the instruments referred to in his letter which besides one for the *Chemical Company* included waivers for a number of companies *which so far as the record discloses were going corporations responsible for their own tax liabilities, and with which the respondent had no connection.* A. A. Schlesinger, the chief executive officer of the respondent was on the stand as a witness for the petitioner (R. 26) but was not questioned as to Westerman's authority. There is no evidence in the record that Westerman had anything to do with procuring the execution of any of the instruments. The only instrument offered in evidence which is claimed to have been among those enclosed in Westerman's letter is one undated, stamped "*Received, Feb. 26, 1924,* E. D. S. ..... Audit Division" (R. 131-132). There was no evidence to authenticate the stamp. The instrument was signed in the name of the *Chemical Company by H. J. Schlesinger,* Vice-president, purporting to extend the period for assessing that company (R. 56). It was objected to as incompetent and irrelevant (R. 76). *It is admitted this instrument expired by its terms April 1, 1925* (R. 62; Pet Br. p. 29).

Under date of December 3, 1924, the Commissioner with the notices on file that he had had of the dissolution of the *Chemical Company* March 1, 1920, addressed a letter to it, advising it of a tentative determination of a deficiency in tax against it in the sum

of $226,710.08, based on a ruling that it was not affiliated with the *Newport Mining Company* or any other corporation for the year 1917 and that its tax liability had been determined on a non-consolidated basis (R. 46-48).

To that determination protests by the *Newport Mining Company*, the *Dunn Iron Mining Company* and the Chemical Company were filed based on the ruling of the Commissioner *that the three companies were not affiliated* (P. 50, 51). The protests were forwarded to the Commissioner in a letter dated December 26, 1924 which after referring to the protests enclosed, stated:

> "We also enclose new waivers for the year 1917 for the Newport Mining Company, Newport Chemical Works Inc., *Newport Turpentine & Rosin Company of Florida, Newport Turpentine & Rosin Company, Incorporated*, and *Gogebic Steel Company.*
>
> The waivers for the *Dunn Iron Mining Company*, Harrow Spring Company, Northwestern Light & Power Company, Northwestern Lime, Stone & Slag Company, Northwestern Milling Company, Harvest Farms Company and Northwestern Iron Company will be forwarded by the *Youngstown Sheet & Tube Company* with the protests of the Northwestern Iron Co. and Harrow Spring Co. all of which we trust you will receive in proper order and in due season" (Italics ours).

The letter was signed, "Charles F. Fawsett, General Counsel" for all of the companies referred to in the letter.

The petitioner offered in evidence an instrument dated *December 23, 1924*, purporting to be *a consent in writing by the Chemical Company* to an extension of the period for its assessment, signed *Newport Chemical Works Inc. Taxpayer*, by *H. J. Schlesinger*, Vice-president and by D. H. Blair, Commissioner (R. 57, 58). Stamped thereon were the words "Consolidated Returns Audit Division, Dec. 31, 1924, Asst. Head of Division." The stamp was not signed and was not authenticated by any evidence. *The instrument was objected to as incompetent and irrelevant* (R. 76). It is claimed by the petitioner that this was the waiver for the Chemical Company referred to in the above letter dated December 26, 1924. The evidence showed that Charles F. Fawsett, who signed the letter, was counsel for the *Chemical Company* prior to its dissolution and acted as counsel for the respondent after the dissolution of the Chemical Company *but only in matters that were specially referred to him.* The company had another attorney who had charge of all of its legal work and only matters were referred to counsel that the regular attorney of the company could not decide for himself or when he wanted a corroboratory opinion (R. 28). There was no evidence that Mr. Fawsett was employed *by the respondent* to transmit the protests and waivers referred to in the letter. The *respondent* was not among the companies referred to in the letter. The protest of the *Chemical Company* which was inclosed in the letter, *was not offered in evidence.* The name of the *respondent* does not appear in connection with the protests of the *Newport Mining Company* and the *Dunn Iron Mining Company* which were offered. The verification of those protests which states that it was made particularly on behalf of the Newport Mining Company and the Dunn Iron Mining

Company (R. 51) *makes no reference to the respondent.* Of the three companies purporting to join in the protests the *Dunn Iron Mining Company* insofar as anything to the contrary is shown, was a live corporation, having a common interest with *the two dissolved companies,* in the subject matter of the protest.

December 14, 1925, the Commissioner addressed a letter to the defunct *Chemical Company* proposing *another redetermination of its tax liability for the year 1917,* in the sum of $211,227.75 (R. 53, 54) in which it was stated:

> "You are granted 30 days from the date of this letter within which to present a protest, supported by additional evidence or brief, against this determination of a deficiency. Any additional evidence submitted should be under oath. Upon request submitted within the period mentioned, you will also be granted a hearing in the Bureau with reference to the matter" (R. 53).

In response thereto, *an unsigned instrument* was filed purporting to be a protest of the *Chemical Company,* and the *Newport Mining Company.* Attached to it was an affidavit of *A. A. Schlesinger,* sworn to February 8, 1926 (R. 56-60), and set out in full in petitioner's brief (pp. 9-10). In the body of the instrument to which the affidavit related, it was stated that the entire basis of the protest was the *omission of the Commissioner* to take into account in the determination of the tax liabilities of the *Chemical Company,* a previous ruling made by him the date of which was referred to, in which he had held that the *Chemical*

Company was affiliated with the *Newport Mining Company* for the year 1917 (R. 59). The instrument contained an offer to file waivers and stated that the instrument itself might be considered a waiver until formal waivers could be prepared and filed (R. 60).

Attention is directed to the fact that the verification of the instrument does not purport to be made on behalf of the respondent or by its authority. The instrument itself was not signed *by the Commissioner* or by *anyone. There is no evidence in the record that it was acknowledged or that it was ever referred to in writing or otherwise by the Commissioner.* There was no evidence as to how it came to his hands.

The remaining instruments offered as waivers was one dated January 12, 1926, purporting to be a waiver by the *Chemical Company* of the time prescribed by law for making assessment against it, signed in the name of the *Chemical Company by H. J. Schlesinger as vice-president,* effective to December 31, 1926 (R. 61), (with no evidence of how it was transmitted or came to the hands of the Commissioner), and the instrument, dated November 6, 1926, executed by the respondent (R. 62).

STATUTES INVOLVED.

The statutes involved are set forth in the appendix to the petitioner's brief.

QUESTION PRESENTED.

It is conceded in petitioner's brief that the authority of the Commissioner to make the proposed assessment, depends upon the validity of the instruments relied on as waivers (p. 16). It is admitted that all of these instruments that were received by the Com-

missioner *before the passage of the 1926 Act*, expired before the passage of that Act, *with the exception of three* beginning with the one dated *December 23, 1924* (R. 57, 58). The question in the case is whether any of *these three instruments*, or the one dated November 6, 1926, *after the passage of the 1926 Act* executed by the respondent was sufficient to authorize the proposed assessment.

SUMMARY OF ARGUMENT.

The evidence was amply sufficient to support the findings of the Board of Tax Appeals confirmed by the decision of the court below that the period for assessing the taxpayer (the *Chemical Company)* had expired before the passage of the 1926 Act. H. J. Schlesinger, who executed the instruments in the name of the *Chemical Company* after it ceased to exist, relied on here by the petitioner to extend the period for assessment beyond the effective date of the 1926 Act, *was himself a transferee of the dissolved corporation*, and as such liable for its taxes. He had no interest in or connection with the *respondent* at the time of the execution of these instruments. There is no evidence that the respondent procured their execution or authorized the same.

There are no grounds for the contention that the decree of the Supreme Judicial Court of Maine which dissolved the *Chemical Company* March 1, 1920 was void or not effectual to dissolve the corporation. The necessary parties were before the court and it had jurisdiction of the subject matter.

There is no basis in the record for the application of the doctrine of estoppel. At the times of the re-

ceipt of the instruments purporting to be executed by the *Chemical Company,* the Commissioner had full knowledge *that the Chemical Company had ceased to exist* and that no waiver could be executed by it or with its authority, *and there could be no extension* of the period for its assessment. There is no evidence in the record that he was misled by any representation, act or conduct of the respondent. *The Board of Tax Appeals expressly found that he was not.*

The instrument of November 6, 1926 executed by the respondent after the passage of the 1926 Act was ineffectual to authorize the proposed assessment of the respondent as a transferee for the reasons—

(1) The bar of the statute having fallen before the passage of the 1926 Act against any assessment of the taxpayer, Section 280 authorizing assessment of transferees was inapplicable to the respondent. It could not be made applicable by any agreement between it and the Commissioner.

(2) The instrument was void on its face. By its terms it merely purported to waive the period prescribed by law for assessing the *Chemical Company* described as the taxpayer in the body of the instrument, *for taxes due from it.* Clearly a transferee is without authority to extend the period for assessing its transferor. A waiver is a voluntary relinquishment of legal rights and its terms, where in writing, must be strictly construed. Construed in accordance with its terms, this instrument *showed on its face* that it was executed without authority for the purpose for which it purported to be executed. It did not purport to extend the period for assessing the respondent as a transferee, *except as the period for assessing the trans-*

feror might be extended. If it was not effective to extend the period for assessing the transferor, it was not effective at all. The meaning clearly expressed by its terms, cannot be enlarged by construction. There is no provision in the statute for extending the period for assessing a transferee *except as the period for assessing the taxpayer may be extended.* No one can of course do that other than the taxpayer himself or one acting by his authority.

(3) At the time of the execution of the instrument all liability of the taxpayer for taxes referred to therein had been discharged by the operation of Section 1106 of the 1926 Act. When liability for the tax was discharged *the foundation of the authority* of the Commissioner to make any assessment therefor, *was destroyed.* It could not be reconstructed or restored by any waiver by the transferee. The authority for making an assessment can be conferred only by statute. Section 612 of the 1928 Act did not have the effect to reimpose the tax. No such intention was expressed, and the contrary clearly appears from related provisions of the 1928 Act. Furthermore, Congress was without power to recreate the liability of a transferee after it was discharged, as that was a liability arising *in contract or under the common law or in equity.* It was not imposed upon the transferee by any statute and could not be reimposed or recreated by statute, once it was discharged.

(4) If Section 612 of the 1928 Act was effective to recreate the liability of the taxpayer, as so recreated *it was still subject to the bar of the statute of limitations as it existed before the enactment of Section 1106 (a) of the 1926 Act.* The instrument in question must be construed in the light of the conditions existing *at*

the time it was executed. At that time there were no taxes *due from the taxpayer.* Congress might repeal the statute that had extinguished *liability for the tax,* but it could not repeal the *fact* that it was the law before it was repealed. The instrument in terms merely purports to waive the time prescribed by law for assessing the taxpayer *for taxes due under the returns referred to.* If there were no taxes *then due from the taxpayer,* aside from all other objections to the proposed assessment it was not authorized *by the terms of the instrument.* The instrument which *in terms* waived only the time prescribed by law for assessing taxes due from the taxpayer, a *separate and distinct corporation,* did not authorize the assessment of the respondent as a transferee for any taxes which were not then due and owing from the corporation referred to and *from which it had been discharged.* There is no time prescribed by law within which the Commissioner may make an assessment for taxes *from which the taxpayer has been discharged.*

(5) Independent of all other objections the instrument in question was ineffectual to authorize the proposed assessment, for the reason that it was not shown that the respondent *had knowledge of the facts* which had resulted in *the bar of the statute* prior to the execution of the instrument. The burden of proof was on the Commissioner to show such knowledge. There is no presumption that the respondent, a separate and distinct corporation, had knowledge of the facts which showed that the bar of the statute had fallen against the taxpayer.

The unsigned instrument verified January 8, 1926, by A. A. Schlesinger was not the act of the respondent, and has no connection with the instrument of Novem-

ber 6, 1926. As found by the Board of Tax Appeals and the Court below, it was merely the act of A. A. Schlesinger.

ARGUMENT.

To follow the order of the argument for the petitioner, the instrument executed by the respondent after the passage of the 1926 Act will be considered first.

I.

The instrument of November 6, 1926, executed by the respondent was ineffectual to authorize the proposed assessment.

A.

This instrument was void on its face.

It was apparent that it was not executed with any authority for the purpose for which it purported to be executed, namely, as a waiver of the time prescribed by law for assessing the transferor of the respondent. The transferee cannot of course extend the period prescribed by law for assessing the transferor. The instrument did not purport to be executed for any other purpose. It must be strictly construed. The Board of Tax Appeals has many times held that such instruments are void.

Bamberg Cotton Mills, 8 B. T. A. 1236;
Carnation Milk Products Co., 15 B. T. A. 556;
Barron-Anderson Co., 17 B. T. A. 686;
Lillie M. Jones et al., 21 B. T. A. 275;
Oswego Falls Corp., 26 B. T. A. 60, 67.

These decisions are supported by the *terms of the statute* and the rules of construction applicable to tax laws.

The statute prescribed the period within which the taxpayer may be assessed and how the period may be extended. The method prescribed for its extension is that it must be by consent in writing *signed by the taxpayer* and the Commissioner. When effectively executed, the period *of the statute* is the primary period *as so extended.*

Loewer Realty Co. vs. Anderson, 31 Fed. (2d) 268, 269 (C. C. A. 2d) Certiorari denied 280 U. S. 558;

L. Loewy & Son vs. Commissioner, 31 Fed. (2d) (C. C. A. 2d) 652;

Florsheim Bros. Dry Goods Co. vs. U. S., 29 Fed. (2d) 875 (C. C. A. 5th) affirmed 280 U. S. 453.

The limitation in the statute upon the authority of the Commissioner to make assessments is for the benefit and protection of the taxpayer and must be strictly construed against the government and liberally in favor of the taxpayer. *U. S. vs. Updike,* 281 U. S. 489, 496. There is no reason why the same rule should not apply to any claimed extension of the period for assessment. There is no authority in the statute for execution by a transferee of the consent in writing which is the *only method* prescribed for extending the period for any assessment the Commissioner is authorized to make. Prior to the 1926 Act there was no authority for the assessment of a transferee and the provision of that Act which *created the liability* of the transferee *to assessment,* expressly limited the authority for

the assessment to a period of one year "after the expiration of the period of limitation for assessment against *the taxpayer*" (Sec. 280 (b)). Thus, the period for assessing the transferee *is based upon the period for assessing the taxpayer.* The obvious reason for that is, that the liability of the transferee is derivative, and secondary to that of the taxpayer. Section 280, the only provision of the statute that refers to a transferee distinguishes throughout between the "taxpayer" and the *transferee,* and uses the terms *in contradistinction.* Section 278 (c) provides:

> "Where both the Commissioner and the taxpayer have consented in writing to the assessment of the tax after the time prescribed in section 277 for its assessment, the tax may be assessed at any time prior to the expiration of the period agreed upon."

Section 277 refers in terms *to the tax imposed by the statute* and the time prescribed for its assessment is "within five years after the return was filed." Only the taxpayer on whom the tax is imposed by the statute is required *to file a return.* There can be no doubt that the word "taxpayer" as used in Section 278 refers *to the one on whom the tax was imposed by the statute,* and no other. There is no room in the terms of that section for any claim that the word "taxpayer" as used therein includes a transferee, and under the rules of construction applicable to all tax laws its meaning cannot be extended by construction for the benefit of the taxing power. The instrument in question was not executed in the manner provided by the statute for extending the period for assessment, the provision for which relates only to the period for assessing *the tax-*

payer upon whom the tax was imposed by the statute. Obviously a transferee is not competent to extend the period for assessing the transferor, upon whom the tax was imposed.

May the instrument in question be considered an informal or common law waiver within the rule of *Stange vs. U. S.* (282 U. S. 270), waiving or extending the period prescribed by the statute *for assessing the respondent as a transferee?* The answer to that question must be no, for the reasons: (1) It does not *by its terms* purport to waive the period for assessing the respondent as a transferee, except as it may be effective to extend the period for assessing the transferor. A waiver is a voluntary relinquishment of a right. If it is not *in terms* effective to relinquish a right, it cannot be made so by construction. It must be strictly construed. (2) The limitation of the time within which the transferee may be assessed *is part of the definition of the liability* of a transferee to assessment. The provision of the statute for assessing a transferee created a new remedy for the enforcement of the liability of the transferee for the tax. It created in effect *a new and additional right of action.* That the new right of action created is summary in its nature, is all the more reason why it should be confined strictly within the limitations of the statute by which it was created. The same section of the statute which created such new right of action *limited the time within which the right may be exercised.* Where a right of action is created, the *time within which the right must be exercised* as provided in the statute which created the right, *operates as a limitation upon the right itself.*

The Harrisburg, 119 U. S. 199, 214;
Central Vt. R. R. vs. White, 238 U. S. 507, 551;
Atlantic Coast Line R. Co. vs. Burnette, 239 U. S. 199, 201;
Davis vs. Mills, 194 U. S. 451, 454.

These decisions must apply with added force to a *summary right of action* such as a right to enforce a *common law liability* by assessment and distraint.

As said by Mr. Justice Holmes in the case last cited:

> "The common case is where the statute creates a new liability and *in the same section or in the same act* limits the time within which it can be enforced, whether using words of condition or not. *The Harrisburg*, 119 U. S. 199. But the fact that the limitation is contained in the same section or the same statute is material only as bearing on construction. It is merely a ground for saying that the limitation goes to the right created, and accompanies the obligation everywhere. The same conclusion would be reached if the limitation was in a different statute, provided it was directed to the newly created liability so specifically as to warrant saying that it qualified the right" (p. 454) (Italics ours).

Here, the limitation was contained *in the same section* of the statute that created the right.

The Commissioner must find his authority for assessment of a transferee *in the statute*. The limitations therein imposed upon his authority, are as much a part of the statute as that which grants the author-

ity. The time within which the assessment of a transferee may be made as limited by the statute, is not independent of the time within which the taxpayer may be assessed, *but is based upon it.* The instrument in question, *by its terms preserves the rights of the respondent as a transferee to have its liability conditioned upon that of the taxpayer, and limited thereby.* It does not purport to extend the period for assessing the *respondent* as a transferee, except as the instrument may be effective to extend the period for assessing the *taxpayer,* its transferor. Clearly it was not effective for that purpose and consequently it was not effective to extend the period for assessing the respondent as a transferee. There is no element of estoppel involved, insofar as this instrument is concerned. Its insufficiency is a matter of law *and appears on its face.*

B.

At the Time of the Execution of the Instrument, Section 1106 (a) of the 1926 Act Had Operated to Extinguish All Liability for the Tax Referred to Therein.[1]

That section provided that "The bar of the statute of limitations against the United States in respect of any internal revenue tax shall not only operate to bar the remedy but shall extinguish the liability."

In the brief referred to by the petitioner in another case and made part of his argument, it is argued that the statute of limitations is not self-executing, that there is no "bar" until the *statute is pleaded* and the

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1) This assumes that the period for assessing the taxpayer had expired before the passage of the 1926 Act.

facts to show that it has run are proved—and that in the meantime, *it may be waived.* That argument will not stand analysis. What must be pleaded *is the fact* that the period of the statute has run. It is that fact which constitutes the bar of the statute, and it must exist *as a fact* before it can be pleaded. *Compare U. S. vs. Updike,* 281 U. S. 489 at page 495, 50 S. Ct. 367 at page 369. To plead the bar of the statute, as in any other pleading, the facts must be pleaded which show that the bar of the statute has fallen. The *bar of the statute* is the operation of the statute upon the facts. These are the facts which show that the period prescribed for the assessment of the tax expired without an assessment. When these facts exist the bar of the statute falls. The legal consequences are a matter of law. In the courts of the United States the legal consequences of the bar of the statute as a general rule, *is to bar the remedy only.*

Campbell vs. Holt, 115 U. S. 620.

As said in *Brent vs. Bank of Washington,* 10 Pet. 361, 596, 617:

> "In The Bank of the United States vs. Donnelly, 8 Pet. 361, this court laid it down as an established principle that the act of limitations operated only to bar the remedy, *not to extinguish the right* or cause of action." (Italics ours).

By the express terms of Section 1106 (a) enacted as part of the Revenue Act of 1926, it was provided that the bar of the statute shall not only operate to bar the remedy *but also to extinguish the liability for the tax.* Thus by the operation of the *express terms*

of that provision of the statute *upon the facts* as they existed *at the time of its enactment*, all liability of the taxpayer upon which the liability of the *respondent* as a transferee depended, was discharged. Whether or not any waiver could thereafter be executed either by the taxpayer or the transferee authorizing an assessment for the tax notwithstanding all liability therefore had been discharged by the statute, is another question that will be considered later.

C.

Section 612 of the 1928 Act Did Not Recreate Any Liability for the Tax That Was Discharged by Section 1106 (a) of the 1926 Act.

Whatever may have been *the purpose of* the repeal of Section 1106 (a) of the 1926 Act *as of the date of its enactment*, Section 612 of the 1928 Act by which the repeal was effected, does not *in terms* express any intention to recreate the tax liability which had been discharged by the section repealed. An act to recreate liability for a tax after it has been discharged and has ceased to exist, necessarily involves the exercise of the taxing power precisely as though the liability imposed by the Act had never existed. To call such an act the recreation of a tax liability is merely to confuse the issue. As held in *Wm. Danzer Co. Inc. vs. Gulf S. & I. R. Co.*, 268 U. S. 633, 636, where a liability created by an act of Congress *is discharged by the same authority*, it is as though it never existed. The fact that the purpose of the act may have been to reimpose a tax liability that once existed but did not exist at the time of the Act to re-impose it, does not affect the question whether the taxing power has been exercised to re-impose the

tax, *in the manner required to impose a tax.* The power to impose taxes is in Congress, but the question of when the power has been exercised, and how it must be exercised to make it effective, is for the courts.

Under the decisions of this Court, to exercise the taxing power vested in it by the constitution, Congress must *in clear and unequivocal language* express its intention to impose a tax and must define in equally clear and unambiguous terms the tax intended to be imposed.

In *Eidman vs. Martinez,* 184 U. S. 583, the Court said:

> "It is an old and familiar rule of the English courts applicable to all forms of taxation, * * * that the sovereign is bound to express its intention to tax in clear and unambiguous language * * *."

And in *Treat vs. White,* 181 U. S. 264, 267, 21 S. Ct. 611, 613:

> "There must be certainty as to meaning and scope of language imposing any tax and doubt in respect to its meaning is to be resolved in favor of the taxpayer."

It is clear from the decisions of this Court, that whatever may have been the purpose of the repeal of Section 1106 (a) as of the date of its enactment, the repealing act was not effective to re-impose any tax that had been discharged for the simple reason that no such intention was expressed in terms. There need be no inquiry by the Courts into any question of *a purpose to impose a tax,* where no tax is imposed in terms.

If it be assumed for the purposes of the argument, that a tax may be imposed by an Act of Congress without clearly expressing the intent to impose one, there are no grounds for claiming that there was any intent to re-impose the tax discharged by Section 1106, in the enactment of Section 612 of the 1928 Act. The *contrary affirmatively appears* in the related provisions of the same act. As stated in the report of the Ways and Means Committee (House Report No. 2, 70th Congress, 1st Session, p. 33) and in the report of the Finance Committee of the Senate (Senate Report No. 960, 70th Congress, 1st Session, p. 41):

> "Section 1106 (a) of the 1926 Act failed to resolve many doubtful questions as to the legal effect which follows the expiration of the period of limitations prescribed for the assessment or collection of a tax or for the making of a refund or credit or the bringing of a suit for refund. Section 1106 (a) of the 1926 Act is repealed as of its effective date and is replaced by Sections 607, 608, 609 and 610 of this bill."

By Section 607 as the bill was enacted, it was provided that:

> "Any tax (or any interest, penalty, additional amount, or addition to such tax) assessed or paid (whether before or after the enactment of this act) after the expiration of the period of limitation properly applicable thereto shall be considered an overpayment and shall be credited or refunded to the taxpayer if claim therefor is filed within the period of limitation for filing such claim."

That section *which was made retroactive,* was plainly inconsistent with the provision in Section 1106 of the 1926 Act, that notwithstanding the operation of the bar of the statute to extinguish the liability for the tax "no credit or refund in respect of such tax shall be allowed unless the taxpayer has overpaid the tax." Section 607 of the 1928 Act required a credit or refund *of the entire amount of any tax collected after the bar of the statute* of limitations except as it was qualified by Section 611, which qualification *did not remove the inconsistency.*

Sections 607 and 609 of the 1928 Act affirmed *in effect,* all that was done by Section 1106 (a) to extinguish liability for the tax and in addition gave to the taxpayer rights to a refund of taxes paid after the expiration of the statute, which were expressly denied by Section 1106 (a). The later enactment conferring rights denied by Section 1106 (a) would doubtless have operated *to that extent* as a repeal of that provision *as of the date of its enactment* by implication, if it had not been *expressly so repealed,* in its entirety. As the new provisions were enacted to take the place of section 1106 (a) there was no reason why it should not have been repealed in its entirety as of the date of its enactment. Nothing that was granted to taxpayers by Section 1106 (a) was denied to them by the provisions of the 1928 Act, enacted in its place. As said by the Court of Appeals (1st Cir.) in *Commissioner vs. Northern Coal Co.,* 62 Fed. (2d) 742, 745:

> "As a substitute for the provisions of Section 1106, Congress provided in Section 607 (26 USCA § 2607) that any tax assessed or paid after the expiration of the period of limitation

properly applicable thereto shall be considered an overpayment and shall be credited or refunded to the taxpayer, if a claim therefor is filed within the time allowed for filing claims for refunds. In effect, this section re-enacted the part of Section 1106 of the 1926 Act, which barred all liability for the tax, since Section 607 required to be credited or refunded *as an overpayment* the entire amount collected after the period of expiration for collection had expired; and, further, under Section 609 (26 USCA § 2609) it was provided that any attempt to credit a payment against a deficiency shall be void, if the period for assessing or collecting such deficiency had expired, when it was provided under Section 607 of the 1928 Act that all payments after the expiration of the period for assessment and collection shall be deemed *overpayments* and should be credited or refunded, it extinguished the liability for the tax more effectually than was done by Section 1106 of the 1926 Act, under which the government could retain the amount collected, except so much as was in fact an overpayment."

D.

It Was Not Within the Power of Congress to Recreate the Liability of Respondent as a Transferee After It Was Extinguished.

As said by this Court in *Phillips vs. Commissioner of Internal Revenue*, 283 U. S. 589, 594, 51 S. Ct. 608, p. 610:

> "Section 280 (a) (1) provides the United States with a new remedy for enforcing the existing 'liability, at law or in equity.' The quoted words are employed in the statute to describe the kind of liability to which the new remedy is to be applied and to define the extent of such liability. The obligation to be enforced is the liability for the tax."

The obligation of the transferee to pay the tax is not, however, a liability imposed upon it by statute, but *a liability at law or in equity derivative from* and dependent upon, the liability imposed by statute upon the transferor. In this case the liability of the respondent under its contract to pay the liabilities of its transferor as part of the consideration for the transfer, was an express contract liability to pay all liabilities of the transferor *existing at the time* of the contract. Its liability at law or in equity independent of the contract was the same. Whether considered as an express contract liability, or as a liability arising at law or in equity from the circumstances of the transfer, when once discharged, *it could not be reimposed by any Act of Congress.* That would clearly be in contravention of the 5th Amendment. When the liability for

the tax which was imposed upon the transferor by an Act of Congress prior to the transfer, was discharged *by the taxing power which created it,* it was as though it had never existed. *Wm. Danzer Co. Inc. vs. Gulf & S. I. R. Co.,* 268 U. S. 633; 45 S. Ct. 612.

It may be that the tax thus discharged might thereafter be reimposed upon the taxpayer formerly liable therefor, under the decisions of this Court that a tax may be imposed in respect of past benefits. *Graham vs. Goodcell,* 282 U. S. 409, 429. But whether, when so reimposed, it is called a *new assessment* or a *reassessment* is wholly immaterial. As said by the Court in *Wagner vs. Leser,* 239 U. S. 207, 216, 36 S. Ct. 66, 68:

> "The principles of taxation are not those of contract. A special assessment may be levied upon an executed consideration * * *. Of course it does not matter that this is called a reassessment. A reassessment may be a new assessment."

In either case it creates a liability *that did not exist at the time of its imposition or reimposition.* The respondent was liable under its contract or at law or in equity only for the liabilities of its transferor *existing at the time of the transfer.* These included taxes *theretofore imposed* from which the transferor had *not been discharged* by payment or otherwise. As and when they were discharged, the contract of the respondent and *its liability at law or in equity to pay them,* was discharged. The reimposition of any such tax upon the transferor *after it had been discharged,* could not impose upon the respondent any liability for its payment. Such reimposition of the tax would be an independent

and new act of Congress. There would thus be an *independent cause* intervening between the liability of the taxpayer *which was assumed by the respondent as transferee* and the liability reimposed upon the transferor. That injustice might thereby result to the transferor is immaterial. That would be a matter for Congress to consider *in reimposing* the tax from which the transferor had been completely discharged. That statutes creating liability retroactively may have unjust results, is doubtless one of the reasons for the rule that they will not be construed by the courts to create liability retroactively, if such construction can be avoided. See *Wm. Danzer Co. Inc. vs. Gulf & S. I. R. Co.*, 268 U. S. 633 at page 637; 45 S. Ct. 612, 613. To so construe Section 612 of the 1928 Act, even as to the original taxpayer, *would raise grave doubts as to its validity.* It would be to reimpose a tax in the year 1928 originally imposed in 1917 and discharged by the operation of the statute of limitations in 1926. The result would be to impose a tax *upon a limited class,* with no reasonable or equitable basis for the classification. While the members of the class were originally liable for the tax, they had been discharged therefrom by the taxing power which imposed it, *for reasons founded in a sound public policy.* Section 1106 (a) of the 1926 Act, was obviously intended to make the statute of limitations more effective for the purpose for which all such statutes are enacted. As said by this court in *Wood vs. Carpenter,* 101 U. S. 135, 139:

> "Statutes of limitation are vital to the welfare of society and are favored in the law. They are found and approved in all systems of enlightened jurisprudence. They promote repose

by giving security and stability to human affairs. An important public policy lies at their foundation. They stimulate to activity and punish negligence. While time is constantly destroying the evidence of rights, they supply its place by a presumption which renders proof unnecessary."

In *Graham vs. Goodcell*, 282 U. S. 409, 429; 51 S. Ct. 186, 194, the Court said:

"It is apparent, as the result of the decisions that a distinction is made between a bare attempt of the legislature retroactively to create liability for transactions which, fully consummated in the past, are deemed to leave no room for legislative intervention, and the case of a curative statute aptly designed to remedy mistakes and defects in the administration of the government where the remedy can be applied without injustice."

It seems obvious that the tax from which the respondent and others of its class had been discharged by the operation of Section 1106 (a) could not be reimposed on them as a class two years later without discrimination and injustice.

As before pointed out herein there were good reasons for making the repeal of Section 1106 (a) retroactive, without giving it the effect to reimpose taxes *which for good reasons* had been discharged. Where a statute is susceptible to two constructions, one of which must give rise to doubtful constitutional questions, and by the other, such questions are avoided, the court will adopt the latter.

U. S. vs. Delaware & Hudson Co., 213 U. S. 366, 407.

Whether or not Section 612 might be sustained as an act reimposing the tax on the original taxpayer, it was obviously not within the power of Congress to thereby recreate a contract or common law liability of a transferee.

E.

There Could be No Waiver Authorizing an Assessment for the Tax After All Liability Therefor Had Been Extinguished.

In the many cases where the question has arisen in the courts below and before the Board of Tax Appeals it has uniformly been held that there could be no valid assessment where the liability for the tax had been extinguished by the statute.

Dobbins vs. Commissioner, 31 Fed. (2d) 935;
United States vs. John Barth Co., 27 Fed. (2) 782; reversed by this court on other grounds.
Pepsin Syrup Co. vs. Schwaner, 35 Fed. (2d) 197;
Griffiths vs. Commissioner, 50 Fed. (2d) 782;
Commissioner vs. Northern Coal Co., 62 Fed. (2d) 742;
Commissioner vs. Oswego and Syracuse R. Co., 62 Fed. (2d) 518;
Peerless Woolen Mills Co. vs. Commissioner, 13 B. T. A. 1119;
Steiner Manufacturing Co. vs. Commissioner, 18 B. T. A. 740, and other decisions of the Board of Tax Appeals.

The liability for the tax had its origin in an Act of Congress. It was extinguished by the same author-

ity. The conditions were therefore, precisely as in the case of *Wm. Danzer Co. Inc. vs. Gulf & S. I. R. Co.*, wherein this court said that on the expiration of the period of the statute "it was as if liability had never existed". (268 U. S. p. 636). Liability for the tax is *the foundation of the authority* of the Commissioner to make an assessment. When the liability for the tax ceased to exist, the foundation of the authority of the Commissioner to make any assessment therefor, was destroyed.

It is claimed in the argument for the petitioner that whether the statute extinguishes the liability for the tax, or merely bars the remedy for its collection, in either case it gives rise to a right which the taxpayer may waive. But where the statute has discharged all liability for the tax, the instrument relied upon as a waiver must not only waive the objections the taxpayer might make to a proposed assessment, *but must create a right in the Commissioner to make an assessment, which does not exist, and can only be created by statute.* The *foundation of the right* of the Commissioner to make an assessment is an existing liability for the tax. That liability was created by statute. When it is destroyed by the legislative power which created it, it cannot be recreated by *any act of the Commissioner* or of the taxpayer. To avoid the effect of the express terms of the statute discharging the liability for the tax, reference is made by the petitioner to a statement in the Conference Report on the bill to enact the 1926 Act in which it was stated:

> "This amendment" (referring to Section 1106(a)) "is deemed advisable because of an opinion in a recent decision of the Court of Claims (Toxaway Mills vs. U. S.)."

The only part of the opinion of the Court of Claims in the *Toxaway Mills* case (61 Ct. Cl. 363), *the effect of which* was changed by Section 1106 (a), is the conclusion stated therein that the statute of limitations as it then stood *did not operate to extinguish the right* but merely to bar the remedy. Insofar as the enactment of Section 1106(a) was prompted by that decision, the only logical conclusion is that it was designed to clarify or change the law in that respect. That there were grounds for difference of opinion as to the correctness of that part of the opinion of the Court of Claims is shown by subsequent decisions of other federal courts *which were uniformly to the contrary,*[1] until the question was finally settled by this Court in accordance with the decision of the Court of Claims, in *Stange vs. U. S.* 282 U. S. 270.

There was no ambiguity *in the provision of Section 1106 (a)* which made the running of the statute operate to extinguish liability for the tax. The provision that there should be no refund unless the taxpayer had overpaid the tax did not raise an ambiguity in any proper sense of the term but was in the nature of a *proviso.* Congress had the right to make the proviso.

If, as claimed by the petitioner, the provision of Section 1106 (a) which in express terms extinguished all liability for the tax after the period of the statute had run, is ineffectual and inoperative *unless and until the statute of limitations is pleaded in a proceeding to collect the tax,* and may be entirely avoided *if in the*

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[1] **Joy Floral Co. vs. Commissioner,** 29 Fed. (2d) 865 **Spear & Co. vs. Heiner,** 34 Fed. (2d) 795; **Pictorial Printing Co. vs. Commissioner,** 38 Fed. (2d) 563; **Columbia Iron Works vs. Brock,** 38 Fed. (2d) 816; **Chicago Ry. Equipment Co. vs. Commissioner,** 39 Fed. (2d) 378.

meantime the Commissioner can obtain a waiver from the taxpayer, *it added nothing to the statute as it existed before.* Provisions in the Revenue Acts intended for the protection of the taxpayer are to be liberally construed in favor of the taxpayer.

U. S. vs. Updike, 281 U. S. 489, 50 S. Ct. 367-369.

Taxing statutes are to be construed most strongly in favor of the taxpayer and against the government.

Gould vs. Gould, 245 U. S. 151, 38 S. Ct. 53, 62 L. Ed. 211;

Bowers vs. New York & Albany Lighterage Company, 273 U. S. 346, 47 S. Ct. 389, 71 L. Ed. 676;

Russell vs. United States, 278 U. S. 181, 49 S. Ct. 121, 73 L. Ed. 255.

This applies equally to limitation provisions incorporated in the revenue acts that operate against the government, *U. S. vs. Updike, supra.*

To construe the provision here in question as contended by the petitioner would be to neutralize it completely and render it entirely meaningless.

As said by the Court in *Atlantic C. L. R. Co. vs. Burnette,* 239 U. S. 199, 201, 36 S. Ct. 75, 76:

> "* * * we are not to be curious in nomenclature if Congress has made its will plain, nor to allow substantive rights to be impaired under the name of procedure."

The cases referred to in petitioner's brief on this question are without application.

Burnet vs. Desmornes, 226 U. S. 145, and *Atlantic C. L. R. Co. vs. Burnette,* 239 U. S. 199, involved only

questions of pleading, and that of *Finn vs. U. S.*, 123 U. S. 227, questions of compliance with conditions prescribed by statute, to enforce a claim against the United States. The statement in the opinion in the *Finn* case, that limitation does not operate by its own force as a bar but is a defense which must be pleaded and may be waived, was expressly stated as "the general rule." The *general rule*, in the courts of the United States is, as before pointed out, that the statute of limitations does not extinguish the right but merely affects the remedy. We are not here dealing with the ordinary statute of limitations or with the *general rule*, but with a special limitation upon the authority of a public officer to act under a statute, and with a statute, which *contrary to the general rule of statutes of limitation, not only bars the remedy* but expressly extinguishes the right. Even in such a case we would not contend that the benefits of the statute might not be lost by failure to plead it in a case where the rights it confers are put in issue, and the party claiming such rights is required by the rules of pleading to affirmatively plead them. Such was the case in *Burnet vs. Desmornes*, supra, relied on by the petitioner, wherein Mr. Justice Holmes said:

> "The question before us is a question of pleading and not every matter that may affect the existence of the right at the time of bringing suit must be dealt with by the plaintiff in stating his cause of action. A release under seal destroys a right as fully as prescription could, yet a plaintiff does not have to deny a release in his declaration."

We are not here concerned with any question of pleading. The respondent did plead the statute in the

case before the Board of Tax Appeals, the first opportunity that offered after the proposed assessment. The question here is whether it can be held to have waived the right to show in the case before the Board by proof, *that there was no liability for the tax proposed to be assessed.* The question is whether there is any basis in law for the proposed assessment. Where the tax liability has been discharged by the taxing power which created it, the discharge must be as effectual and complete as though the tax had been paid. The existence *of a liability for the tax* is the basis of the authority of the Commissioner to make *any assessment*. To say that the taxpayer can be precluded by any agreement with the Commissioner from proving the facts which show that the liability for the tax has been discharged, is to say that it may be precluded from showing that in proceeding to make an assessment in a particular case, the *Commissioner is acting without authority of law.* Surely, the doctrine of waiver is without application in such a case.[1]

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1) We have not considered it necessary to argue that Section 1106 (a) was part of the 1926 Act and of the law as it existed at the time of the instrument of November 6, 1926, notwithstanding its retroactive repeal. See Appendix hereto annexed.

F.

The Bar of the Statute Against Assessment of the Transferor Having Fallen Before the Passage of the 1926 Act, Section 280 of That Act Authorizing the Assessment of Transferees Was Without Application to the Respondent.

Prior to the 1926 Act transferees were not subject to assessment. By Section 280 of that act, they were

made subject to assessment for their liability *at law or in equity* for the payment of the tax imposed upon the taxpayer but only "(1) *within one year after the expiration of the period of limitation for assessment against the taxpayer; or* (2) *if the period of limitation for assessment against the taxpayer expired before the enactment of this act but assessment against the taxpayer was made within such period, then within six years after the making of such assessment against the taxpayer, but in no case later than one year after the enactment of this Act*" (Italics ours).

By Section 278, subject to exceptions not here material, any proceeding to collect the tax was prohibited unless begun "(1) within six years after the assessment of the tax; or (2) prior to the expiration of any period for collection agreed upon in writing by the Commissioner and the taxpayer."

The limitation of the time within which transferees could be assessed, *was part of the statute which created their liability to assessment.* It seems clear that where the time for assessing the taxpayer had expired before the enactment of the 1926 Act, there was no authority conferred by Section 280 for the assessment of the transferee, and that section is without application. It was so held by the Board of Tax Appeals in *Caroline J. Shaw Executrix,* 21 B. T. A. 400, upon what seems entirely sound reasoning. *A fortiori* must this be so where as in this case the bar of the statute had discharged the taxpayer and consequently the transferee *from all liability for the tax.*

G.

The Proposed Assessment Was Not Within the Terms of the Instrument of November 6, 1926, and It Cannot be Brought Within Its Terms by Construction.

The instrument must be construed in the light of the conditions and facts known, or which might be presumed to be known, to the party executing it as a waiver, *at the time it was executed.*

The instrument purported to waive the time prescribed by law for making any assessment of taxes due from the *taxpayer* referred to therein under its returns for the years 1917 and 1918. If the bar of the statute had fallen before the passage of the 1926 Act there were no taxes due from the taxpayer under those returns. There is no time prescribed by law *within which the Commissioner may make any assessment of taxes from which the taxpayer has been discharged,* and if the taxpayer at the time of the execution of the instrument had been discharged from all liability for any tax under the returns referred to, the authority of the Commissioner to make the proposed assessment was not within the terms of the instrument. *Waiver is a question of intention.* It cannot be presumed in the absence of language clearly and uniquivocally expressing such intention that it was the intention of the respondent to authorize an assessment for taxes against it, if all liability of the taxpayer *who was primarily liable for the tax* had been discharged. Certainly, the language of the instrument relied on as a waiver, does not require that construction.

H.

Entirely Aside From the Foregoing Propositions, the Instrument of November 6, 1926 Was Ineffectual as a Waiver of the Right of the Respondent to Object to the Proposed Assessment, for the Reason There Was No Proof That It Knew at the Time of the Execution of the Instrument That the Period for Assessing the Taxpayer Had Expired.

A waiver is a voluntary relinquishment of a *known right* and the burden of proving *knowledge of the facts* upon which the right claimed to have been waived depended, is upon the party asserting the waiver.

Panther Rubber Mfg. Co. vs. Commissioner, 45 Fed. (2d) (C. C. C. 1st) 314, 316;
40 *Cyc.*, 252, 259, 261 and numerous cases cited;
27 *R. C. L.* 904, 910 and cases cited.
40 *Cyc.*, 269.

"A presumption of the relinquishment of a known right cannot be rested on a presumption that such right was known, and waiver must be clearly proved."

27 *R. C. L.* 910.

"The evidence must show knowledge, at the time the waiver is claimed to have occurred, of all the material facts that would probably have influenced the conduct of the party."

40 *Cyc.*, 261 and cases cited.

It is altogether improbable that the respondent would have executed any such instrument, if it had

known the facts which showed that all liability of the taxpayer for the tax referred to, had been discharged. It may be presumed that the respondent knew the statutes, but there can be no presumption that it knew the facts *upon which they operated to discharge the taxpayer from liability for the tax.*

Whether the time for assessing the taxpayer referred to in the instrument, had expired and the respondent had been discharged from liability as a transferee at the time of the execution of the instrument, depended *upon the facts,* as to when the returns referred to were filed; whether they were free from fraud, so as to make the statute applicable; whether they were executed in the manner required by the statute to start the running of the statute, and what agreements had been executed before the taxpayer ceased to exist March 1, 1923, extending the period for its assessment. There was no proof that A. A. Schlesinger or the *respondent,* had knowledge of any of these facts. There was no evidence that Schlesinger had ever had anything to do with the tax liabilities of the chemical company. It was developed on the trial before the Board of Tax Appeals *that an unlimited waiver was executed by the taxpayer December 15, 1920, while it was still competent* to execute a waiver, signed by Edward G. Wilmer, its vice-president, and that it was terminated April 1, 1924, *by the act of the Commissioner himself.* (Pet. Br. p. 6). Except for that *act of the Commissioner,* it would have been at least an open question, whether the unlimited waiver executed by the taxpayer would have expired before the passage of the 1926 Act, less than six years after it was given. There is no evidence that the respondent had any knowledge *of that act of the Com-*

missioner. The statement in petitioner's brief from the opinion of this Court in *Stange vs. U. S.*, that *"it must be assumed that an effective and not a futile act was intended,"* is obviously without application as applied to the act of the respondent in executing the instrument in question. The petitioner who signed the instrument knew the facts which rendered it futile, *but there is no evidence in the case that the respondent knew them.* As said by the Court of Appeals for the First Circuit in *Panther Rubber Mfg. Co. vs. Commissioner*, supra:

> "A waiver is the intentional relinquishment of a *known right.* Waiver implies knowledge and is not applicable to one who has acted without full knowledge of all the facts. *The party relying on waivers assumes the burden of proof as to the knowledge of the party making the waiver"* (Italics ours).

II.

The unsigned instrument verified by A. A. Schlesinger January 8, 1926 has no connection with the instrument of November 6, 1926, and is without effect as a waiver.

It was found by the Board of Tax Appeals and the court below, that this instrument was merely the act of A. A. Schlesinger (R. 138, 162). It was not, as asserted in petitioner's brief (p. 16) *signed by the respondent.* It was not signed at all. Everything that was stated in the affidavit attached to it, is *entirely consistent with the fact that the respondent may have expressly refused to have anything to do with it* and

there is no evidence that it did. The respondent could not deny the facts stated in the affidavit. It was not stated that it was made by the affiant *as an officer of the respondent* or by its authority. The facts stated were appropriate to show the acquaintance of the affiant with the matters stated in the instrument to which the affidavit related. The *only purpose* of the instrument as stated therein, was to call the attention of the Commissioner to a previous ruling he had made to the effect that the Chemical Company was affiliated with the Newport Mining Company for the year 1917 which he had apparently overlooked. Any one might call the Commissioner's attention to an oversight.

The Newport Mining Company joined in the protest (R. 59), so that it purported to be made for it as well as for the Chemical Company. A. A. Schlesinger who made the affidavit was one of the five owners (stockholders) of both companies at the time they transferred all of their assets. As such, he was a transferee of the dissolved corporations and liable for the payment of their tax liabilities.

Regulations 69, Art. 1291, 1926 Act;
Updike vs. U. S., 8 Fed. (2d) 913;
Cook on Corporations, (8th Ed.) Vol. 3, Sec. 673, p. 265.

The assumption that only the respondent was interested in the protest to which the affidavit was attached is entirely unwarranted. That *respondent* as part of the consideration for the transfer to it of the assets of the *Chemical Company* had assumed the payment of its liabilities, did not relieve the stockholders of the dissolved corporation of their liability as transferees. See *Opinion General Counsel*

of the Bureau of Internal Revenue, Cum. Bull. V-2, p. 79 (July to December 1926). That this was understood by A. A. Schlesinger, if not by counsel for the Commissioner, is indicated by the record (R. 27). There is no evidence *that the respondent had assumed the liabilities of the Newport Mining Company,* and the stockholders of that Company which had transferred all of its assets and had been dissolved, had an interest in having the Chemical Company included in the consolidated return. Aside from the fact that A. A. Schlesinger was himself liable as a transferee for both the *Chemical Company* and the *Mining Company,* there is no evidence that the respondent was financially able to pay the sum of $211,222.75 which was then being asserted as a deficiency against the *Chemical Company* (R. 53, 54).

The Commissioner had no right to rely on the unsigned instrument. There is no evidence that he paid any attention to it, and under a previous ruling of the Department, IT 2089, Cum. Bull. IH-2, p. 286, he was not required to do so.

As stated in that ruling:

"The letter of protest and briefs of argument filed with the Income Tax Unit as authorized by Treasury Decision 3616 (pp. 275-278) must be signed by the taxpayer or his duly authorized agent or attorney.

The statements of fact relied upon by the taxpayer in support of his protest must be furnished in the form of an affidavit and signed by the taxpayer. The affidavit will not be accepted under any circumstances if signed by taxpayer's attorney or other representative. Statements

of fact by disinterested persons submitted by the taxpayer in support of his protest should be in the form of an affidavit."

It was not until the Act of 1926 *that there was any statute of limitations applicable to the liability of a transferee. U. S. vs. Updike,* 281 U. S. 489, 494. Until the passage of that act, the Commissioner could take all the time he wanted to determine the liability of the taxpayer *for the purpose of enforcing it against the transferee,* and there was therefore no need for a waiver from the transferee. At the time of this instrument *there was nothing for the respondent as a transferee to waive.*

III.

The bar of the statute had fallen against any assessment of the Chemical Company before the passage of the 1926 Act.

We have followed the order of the argument for the petitioner and left this proposition until the last although in natural order, it would seem to come first.

In the contention that the period for assessing the Chemical Company had not expired before the passage of the 1926 Act, *the petitioner relies on instruments executed in the name of the Chemical Company by H. J. Schlesinger as its Vice-president* (Pet. Br. p. 25). Of these the only ones that need be considered are the one dated December 23, 1924 (R. pp. 57, 58) and the one dated January 12, 1926 (R. p. 61). It is admitted that the others expired by their terms before the passage of the 1926 Act. The claimed validity of these

instruments rests upon the claim (1) that the decree of the Supreme Judicial Court of Maine was void and without effect to dissolve the *Chemical Company*, and (2) that the *respondent* is estopped to deny the validity of the instruments.

1. The Decree of the Supreme Judicial Court of Maine, Was Not Void or Open to Collateral Attack in this Proceeding.

There is no indication in the record that that question was raised before the Board of Tax Appeals. On the contrary, it was assigned as error in the petition for review of the decision of the Board of Tax Appeals, *that the Board erred in not finding that the Chemical Company* ceased to exist after the transfer of its assets (R. p. 147). As a matter of fact, it did so hold. There was no evidence that it so ceased to exist, other than the decree of the court dissolving it. Assuming that the petitioner may now take a contrary position, we refer to what is said in the opinion of the court below on that question (R. p. 163), and to the following authorities:

Hall vs. Law, 101 U. S. 461, 463, 364.
Harvey vs. Tyler, 2 Wall. 328, 342-346.
Vorhees vs. Bank of U. S. 10 Pet. 449, 472, 474, 478.

The Supreme Judicial Court of Maine is the highest court of the state. Its decision involved the construction and application of a state statute, and insofar as this court is concerned, *was the act of the state itself.*

Twining vs. New Jersey, 211 U. S. 78; 29 S. Ct. 14, 16.

The decision of the highest court of the state upon a question of local state law is controlling with the federal Supreme Court, no federal question being involved.

Palmer vs. Ohio, 248 U. S. 32, 39 S. Ct. 616;
Ill. C. R. Co. vs. Chicago, 176 U. S. 646, 20 S. Ct. 509;
Clarke vs. Clarke, 178 U. S. 186.

Three years after the date of the decree, March 1, 1920, the corporation ceased to exist for all purposes.

R. S. Maine, Chap. 47, Sec. 77.
Shore Line Road vs. Maine Central R. R., 92 Maine 476.
Carter vs. Stewart Drug Co., 115 Maine, 289.
Oklahoma Natural Gas Co. vs. Oklahoma, 273 U. S. 257.
Crossman vs. Vivienda Water Co. (Calif.) 89. Pac. 335, 336, 337 and numerous authorities referred to therein.

It is suggested that there was identity of interest, and control between the Chemical Company and the respondent which made it in substance a mere continuation of the *Chemical Company* (Pet. Br. p. 27). That claim is without support in fact or in law. While the stockholders of the Chemical Company and the original stockholders of the respondent were the same five individuals (R. pp. 34, 129-130) one of whom was *H. J. Schlesinger*, the two corporations were distinct, and organized under the laws of different states. The statement that the respondent was organized to take over the business of the Chemical Company (Pet. Br. p. 19) is without support in the record. At the time it acquired the assets of the Chemical Company it acquired the assets of the Gogebic Steel Company, the

Western States Coke Company and part of the assets of the Newport Mining Company (R. pp. 15-17, 38). The charter of any of the companies was not offered in evidence, and there is no proof that the respondent carried on the business of the Chemical Company *or that it was authorized by its charter to do so.*, H. J. Schlesinger parted with all of his interest in the respondent in the spring of 1922 and thereafter had no connection with it (R. p. 28). *All of the instruments executed by him as waivers were after that date.* There is no showing in the record that any of the other five stockholders of the Chemical Company retained their interest in the respondent *during the period when instruments relied on by the respondent as waivers were executed,* except as may be inferred from the fact that A. A. Schlesinger appears to have been its president in the year 1926. The respondent insofar as the record discloses was interested only in the tax liabilities of the *Chemical Company,* whereas both *H. J. Schlesinger* and *A. A. Schlesinger* had an interest of their own in the tax liabilities of the Chemical Company *and also in those of the Newport Mining Company* which were involved with those of the Chemical Company. They were transferees of both the dissolved corporations and as such liable for their unpaid tax liabilities, notwithstanding the assumption by the respondent of the liabilities of the Chemical Company.

Regulations 69, Art. 1291, 1926 Act.
Cook on Corporations (8th Ed.) Vol. 3, Sec. 673, p. 265.
Updike vs. U. S., 8 Fed. (2d) 913.
Opinion General Counsel, Cum. Bull. V-2, p. 79 (July to December 1926).

All of the protests in connection with which the so-called waivers signed by *H. J. Schlesinger* were given, were based on rulings of the Commissioner denying the affiliation of the Chemical Company with the Mining Company. These protests as shown by the record were initiated by H. J. Schlesinger (R. pp. 45, 46), after he had severed his connection with the respondent. There was no community of interest betwen him and the respondent *during the period when these protests or the waivers here in question were given.*

A corporation is a distinct legal entity from its stockholders, and this fact cannot ordinarily be disregarded for purposes of taxation.

Planters Cotton Oil Co. vs. Hopkins, 286 U. S. 332; 52 S. Ct. 509.

Burnet vs. Clark, decided December 12, 1932; 53 S. Ct. 207, 209.

Burnet vs. Commonwealth Improvement Co., decided December 12, 1932; 53 S. Ct. 198, 199.

The case of *Phillips vs. Lyman H. Howe Films Co.,* 33 Fed. (2d) 891 referred to in the petitioner's brief, involved a statutory merger of the corporate entities of the companies involved.

In re Wolf Mfg. Industries, 56 Fed. (2d) 64; *Lucas vs. Hunt,* 45 Fed. (2d) 781; *Warner Collieries Co. vs. U. S.,* 63 Fed. (2d) 34 and other cases referred to, not before noticed herein, bear no resemblance in their facts to this case and are obviously without application.

2. The Respondent is Not Estopped to Deny the Validity of the Instruments Executed in the Name of the Chemical Company by H. J. Schlesinger as its Vice-president After It Had Ceased to Exist.

As stated above the only ones of these instruments that are in issue, are the ones dated December 23, 1924 and January 12, 1926 (R. pp. 57, 58, 61). It is admitted that the others expired by their terms before the passage of the 1926 Act.

The instrument of December 23, 1924 purported by its terms to be *an agreement in writing* between the *Chemical Company* as the taxpayer *and the Commissioner* (R. pp. 57, 58). It was signed *as an agreement* of and by the *Chemical Company* by H. J. Schlesinger who at the time had no connection with the respondent. The Commissioner was *fully informed* at the time of the execution of the *agreement*, that the other party to it *was not in existence*. He had no right to assume that anyone was a party to *such an instrument* whose name did not appear on it or in connection with it. If it was one of the instruments enclosed with the letter of Charles F. Fawsett dated December 26, 1924, *of which there was no proof*, there was no evidence that Mr. Fawsett who signed the letter as counsel for the numerous corporations referred to in the letter, was employed by or acted for the respondent in transmitting the instruments referred to therein. The respondent was not one of the Companies referred to in the letter and there is nothing in the record to show that the Commissioner *had any knowledge or information at the time of receiving it*, that Mr. Fawsett *had ever acted as counsel for the respondent*. The power of attorney offered in evidence which was given to him and others to represent the respondent

before the department, was given *January 30, 1925*, more than a month after the date of the letter (R. pp. 32, 33). There is a reference in the instrument to a previous power of attorney referred to in the petitioner's brief as having been given September 5, 1923, but the petitioner *did not choose* to offer that instrument in evidence and *its terms are not disclosed.* Not having offered it, he is in no position to claim there was anything in it that supports his contentions. The protest for the Chemical Company that was enclosed with the letter and which was presumably on file and in the hands of the petitioner, *was not offered in evidence.* If it had shown that the respondent had anything to do with it or with the waiver for the Chemical Company which presumably went with it, it must be assumed that it would have been offered in evidence. In any case the Commissioner was fully informed *of the dissolution of the Chemical Company* at the time of the receipt of the letter and could not have been misled as to its authority to execute any waiver that may have been contained in the letter.

There is no evidence in the record as to how the other instrument dated January 12, 1926, likewise executed by *H. J. Schlesinger*, came to the hands of the Commissioner. It stands in the record merely as a paper executed in the name of the Chemical Company by *H. J. Schlesinger* and signed by the Commissioner. There is no evidence as to how the unsigned instrument verified by A. A. Schlesinger as a protest of the Chemical Company and the *Newport Mining Company*, January 8, 1926, came to the hands of the Commissioner. He had no right to assume that the respondent was responsible for it. There is no evidence that the Commissioner placed any reliance upon it and as

shown above he had no right to do so. The only one of the several protests offered in evidence, with which the respondent was shown to have had any connection, was the first which was filed in the name of the Mining Company in October, 1923 (R. pp. 35, 38). Its only connection shown with that is, that it was verified by H. H. Springford in several capacities, one of which was as the Vice-president of the respondent (R. p. 38). It is said in the brief for the petitioner that this showed that at "*that time the respondent was taking an active interest in the tax liability of its predecessor, the Chemical Company*" (Pet. Br. p. 28). At that time it had a real interest in the tax liability of the Chemical Company. The unlimited waiver that had been given for the *Chemical Company* before it went out of existence had not then expired. It remained in force until April 1, 1924 when as admitted it expired *by the act of the Commissioner* (Pet. Br., Footnote p. 29). The fact that the respondent sanctioned that protest, does not make it responsible for the subsequent protests with which it was not shown to have had anything to do. H. J. Schlesinger was present throughout the trial of the case before the Board of Tax Appeals under subpoena as a witness for the government (R. p. 64). As shown by the record he was not placed on the stand, or called upon to explain the execution of the instruments as waivers that were executed by him in the name of the Chemical Company *when there was no such company in existence.*

A. A. Schlesinger was on the stand as a witness for the petitioner but was not asked to explain his verification of the unsigned instrument of January 8, 1926 which did not purport to be executed by him with any authority of the respondent.

The petitioner is not in position to *rely on inferences* to establish an estoppel, when he was in position to prove the facts explicitly.

> "Where an equitable estoppel is relied upon the facts upon which it is based must be proved with particularity and precision and nothing can be supplied by inference or intendment."
>
> *Standard Sanitary Mfg. Co. vs. Arrott* (C. C. A. 3d), 135 Fed. 750, 757.
>
> *Ruling Case Law*, Vol. 10, p. 845, Sec. 150.

> "The burden of proof rests on the party setting up an estoppel to show the grounds on which it rests, and, as a pleading in estoppel should be certain in every particular and leave nothing to mere inference or intendment, so the evidence to support it must be clear, precise and unequivocal."
>
> *Ruling Case Law*, Vol. 10, p. 845, Sec. 150.

> "For the application of that doctrine there must generally be some *intended deception in the conduct or declaration of the party to be estopped*, or such gross negligence on his part as to amount to constructive fraud, by which another has been misled to his injury. In all this class of cases * * * the doctrine proceeds upon the ground of *constructive fraud or of gross negligence, which in fact implies fraud.*" (Italics ours.)
>
> *Brant vs. Virginia Coal & Iron Co.*, 93 U. S. 326, 335.

There was no evidence of fraud or intended deception on the part of the respondent. It was expressly found by the Board of Tax Appeals that there were no misrepresentations by the respondent and that the pe-

titioner was not misled by any representations, acts or conduct *of the respondent* (R. pp. 142, 143). Upon this as upon every other question of fact in the case, the decision of the Board of Tax Appeals which is supported by evidence is conclusive.

Phillips vs. Commissioner, 283 U. S. 589; 51 S. Ct. 608, 612.

If the evidence was open to conflicting inferences the findings in favor of the respondent are conclusive.

The doctrine of estoppel is obviously not applicable. Where all of the essential facts in the situation are known to the party setting up the estoppel, there can be no estoppel.

Hirning vs. National Reserve Bank (C. C. A. 8th) 52 Fed. (2d) 382, 388 and numerous cases cited therein.

Grouf vs. State National Bank (C. C. A. 8th) 40 Fed. (2d) 2, 7.

Central Improvement Co. vs. Cambria Steel Co. (C. C. A. 8th) 210 Fed. 696, 718.

The respondent was not subject to assessment prior to the passage of the 1926 Act, and was free to contest any excessive claim for tax liabilities of the Chemical Company that might be made against it as a transferee.

Williamsport Wire Rope Co. vs. U. S., 277 U. S. 551; 48 S. Ct. 587.

Phillips vs. Commissioner, 283 U. S. 589; 51 S. Ct. 608, 612.

During the period while the waivers in question were being accepted by the Commissioner *it was wholly immaterial whether they were valid or not.* As before

stated, until the passage of the 1926 Act there was no statute of limitations applicable to transferees. *(U. S. vs. Updike,* 281 U. S. 489, 494.) After the taxpayer had transferred all of its assets, the tax could be collected only from the transferees *and as to them there was no statute of limitations during the period the so-called* waivers were being received and accepted by the Commissioner. That may well explain his readiness to accept anything that was offered as a waiver without inquiry. The fact that he had been informed of the dissolution of the *Chemical Company* and it had made no return since its return for the year in which it was dissolved, 1920, should at least have put him on inquiry as to the authority by which instruments purporting to be executed by it in the years 1923, 1924 and 1926, were executed. *There is no evidence that he made any inquiry.* As a matter *of proximate cause* the government was not prejudiced by the invalidity of the waivers for the Chemical Company received by the Commissioner after it had transferred all of its assets. It was the 1926 Act making transferees subject to assessment but limiting the time within which they could be assessed and otherwise making the statute of limitations applicable to the taxpayer *equally applicable to transferees,* that prevented the tax liability as finally determined by the Commissioner from being enforced against the transferees *which was the only way it could be enforced.* If the government has lost anything, which cannot be assumed, as the plea of the statute of limitations did not admit the correctness of the final determination except for the purposes of the case, *the responsibility rests wholly with the Commissioner.* That the proposed assessments which brought forth the protests were grossly excessive is

indicated by the fact that they were finally reduced by the Commissioner from a peak of $226,710.08 (R. 46, 48) to about $32,000.00 (R. 17). H. J. Schlesinger who appears to have initiated the protests and A. A. Schlesinger who verified the final one, may not have been familiar with the Maine statute which terminated the existence of the Chemical Company for all purposes three years after the date of its dissolution. In any event they were themselves liable as transferees, and their protests were justified. The various determinations of the Commissioner before the 60 day letter purported to be tentative and invited protests. There could be no justification for a delay of nearly ten years in making what purported to be his final determination. As the bar of the statute which was finally raised by the Statute of 1926, was obviously due to the mistakes and inaction of the Commissioner, he has no cause to complain. The statute of limitations, under the circumstances was the proper defense, and it cannot be assumed that it was not a meritorious as well as a legal one. It was a defense favored in the law.

Wood vs. Carpenter, 101 U. S. 135, 139.

CONCLUSION.

In conclusion it is respectfully submitted that the case of the petitioner is without foundation either in law or in equity, and the judgment of the court below should be affirmed.

CHARLES F. FAWSETT,
RICHARD S. DOYLE,
Counsel for Respondent.

APPENDIX.

Senate

70th Congress
1st Session

Report
No. 960

Internal Revenue Bill of 1928

May 1, 1928.—Order to be printed.

Mr. Smoot, from the Committee on Finance, submitted the following:

Report

(To accompany H. R. 1)

* * * * * * *

Sec. 506. Waivers After Expiration of Statute of Limitations.

Section 506 of the House bill amends section 278 (c) and (d) of the revenue act of 1926 so as to provide that the commissioner and the taxpayer may consent, after the statute of limitations has run, to a later assessment or collection of the income, war-profits, and excess-profits taxes imposed by the 1926 and prior acts. The committee believes that this policy is unsound as to the future, and accordingly amended the House bill so as merely to provide that such waivers filed between the date of the enactment of the new act and January 1, 1929, shall be valid even if filed after the expiration of the limitation period in question. As to waivers filed before the enactment of this act but after the expiration of the period of limitation, the committee feels that the matter should be left where it now stands, to be determined under the law in existence at the time the waiver is filed, and by an amendment to the House bill carries that policy into effect.

Copy of Conference Report and statement of the Managers of the House thereon relating to Section 506 as found on page 1 and page 21 of said Conference Report.

House of Representatives

70th Congress
1st Session

Report
No. 1882

Revenue Bill

May 25, 1928—Ordered to be printed.

Mr. Hawley, from the committee of conference, submitted the following:

Conference Report

(To accompany H. R. 1)

The committee of conference on the disagreeing votes of the two Houses on the amendments of the Senate to the bill (H. R. 1) to reduce and equalize taxation, provide revenue, and for other purposes, having met, after full and free conference, have agreed to recommend and do recommend to their respective Houses as follows:

* * * * * * *

That the House recede from its disagreement to the amendments of the Senate numbered * * * 170, 171, 172, 173, 174 * * * and agree to the same.

* * * * * * *

Amendments Nos. 170, 171, 172 and 173: These amendments, which relate to the validity of waivers executed after the expiration of the period of limitation intended to be waived, are similar to amendments Nos. 131, 132, 133 and 134 above. The House bill made such waivers effective even though executed after the expiration of such period. The Senate amendment confines the provisions to waivers executed before the expiration of the period and the House recedes.

Amendment No. 174: This amendment makes valid and effective any waiver executed after the expiration of the period of limitation, notwithstanding the effect of amendments Nos. 170 to 173, inclusive, if entered into after the enactment of this act and before January 1, 1929. The amendment also provides that the above amendments to section 278 of the revenue act of 1926 shall not be construed as in any manner

affecting the validity of waivers made prior to the enactment of this act and the House recedes.

Section 278 (c) as enacted provided:

The amendments made by this section to the Revenue Act of 1926 shall not be construed as in any manner affecting the validity of waivers made prior to the enactment of this Act, which shall be determined according to the law in existence at the time such waiver was filed.

SUPREME COURT OF THE UNITED STATES.

No. 515.—October Term, 1933.

Guy T. Helvering, Commissioner of Internal Revenue, Petitioner, *vs.* The Newport Company.	On Writ of Cetriorari to the United States Circuit Court of Appeals for the Seventh Circuit.

[March 5, 1934.]

Mr. Justice Stone delivered the opinion of the Court.

This case comes here on certiorari to review a judgment of the Court of Appeals for the Seventh Circuit, 65 F. (2d) 925, affirming a decision of the Board of Tax Appeals, that a deficiency assessment against respondent as transferee of the assets of the Newport Chemical Works, Inc., for 1917 income and profits taxes of the transferor was barred by the statute of limitations.

In 1919 the Chemical Works, a Maine corporation, after it had filed its tax return for 1917, transferred all its assets to the respondent, a Delaware corporation, which, as consideration for the transfer, issued its stock to the stockholders of the transferor and assumed all liabilities of the transferor. On March 1, 1920, the Supreme Court of Maine entered a decree which purported to dissolve the Chemical Works. The statutory period of limitation for the assessment and collection of the 1917 taxes, as the government concedes, expired on April 1, 1923, five years after the return for that year had been filed. Whether this period was extended by waiver so as to include the date of the deficiency assessment fixed by the Commissioner's sixty-day letter of March 14, 1927, depends on the validity and effect of several documents filed with the Commissioner by the Chemical Works or by respondent.

During the period from December 15, 1920, to November, 1926, six documents, asserted by the government to be waivers extending the time for assessment, were executed by the Chemical Works by an officer or its general counsel, and lodged with the Commissioner. On or about November 6, 1926, a further waiver extending the

period for assessment to December 31, 1927, executed by respondent by its president, was filed with the Commissioner.

The court below and the Board of Tax Appeals both held, as respondent argues here, that the period for assessment and collection of the tax, which had been indefinitely extended by the terms of the first waiver, was terminated and the assessment barred on April 1, 1924, by a departmental ruling (Mimeograph 3085, II-1 Cum. Bull. 174, April 11, 1923); that all the subsequent waivers, before that of November 6, 1926, were void because they were given by the Chemical Works, which had been previously dissolved; and that, as the assessment against the Chemical Works had thus been barred prior to the Revenue Act of 1926, the right to assess the respondent as transferee could not, under the provisions of that Act, be revived by respondent's waiver of November 6, 1926.

Several independent grounds are urged by the government to support the challenged deficiency assessment. The only one which we need now consider is that the waiver of November 6, 1926, unaided by the earlier ones, extended the time for the assessment against the respondent, as transferee of the Chemical Works, until its expiry date, December 31, 1927. Before that date the assessment had been made.

Respondent, as such transferee, became liable for any tax which might have been lawfully assessed against its transferor before the transfer, and § 280 (a) (1) of the Act of 1926 directs that such liability "shall . . . be assessed, collected and paid in the same manner and subject to the same provisions and limitations as in the case of a deficiency in a tax imposed" by that Act. *Phillips* v. *Commissioner*, 283 U. S. 589. If, as respondent maintains and as the court below held, any assessment was barred before respondent's waiver of November 6, 1926, the effect of that waiver upon the right to assess respondent pursuant to § 280 must be determined by the Revenue Act of 1926.

The provisions of the Act applicable to limitations and waivers are found in §§ 277 and 278. Section 277 fixes the period of limitation, but § 278 (c) provides:

"Where both the Commissioner and the taxpayer have consented in writing to the assessment of the tax after the time prescribed in section 277 for its assessment the tax may be assessed at any time prior to the expiration of the period agreed upon".

Had these provisions stood alone the waiver of November 6, 1926, if otherwise valid, would have extended the time for assessment to the specified date, December 31, 1927, even though it was made after the period for assessment had expired. There is nothing in § 278 (c) or related sections which requires that a waiver be given prior to the expiration of the statutory period, and this Court has uniformly held that, under the identical § 278 (c) of the 1924 Act, the defense of the statute of limitations may be waived by the taxpayer after, as well as before, the expiration of the statutory period. *McDonnell* v. *United States*, 288 U. S. 420; *Stange* v. *United States*, 282 U. S. 270; *Brown & Sons Lumber Co.* v. *Burnet*, 282 U. S. 283, 287; *Burnet* v. *Railway Equipment Co.*, 282 U. S. 295, 298.

To avoid this conclusion here, respondent relies on § 1106 (a) of the Act of 1926, which provides that "The bar of the statute of limitations against the United States in respect of any internal-revenue tax shall not only operate to bar the remedy but shall extinguish the liability; . . . ." This section, it is said, indicates a congressional intent that, once the liability of the taxpayer is extinguished, it should not be revived by waiver. The government argues that this attempted distinction between the defense of the bar of the statute of limitations and the defense that the liability has been extinguished is, at most, only formal and does not affect the application of § 278 (c); that a defense founded on a right which may be waived by failure to plead it may likewise be waived by formal document authorized by statute. *Burnet* v. *Desmornes*, 226 U. S. 145; see *Atlantic Coast Line* v. *Burnette*, 239 U. S. 199, 200; *Finn* v. *United States*, 123 U. S. 227, 233; compare *Stange* v. *United States, supra.* But doubts as to the effect which Congress intended, if any, to be given to the quoted provision of § 1106 (a) in construing § 278 (c)[1] were removed by § 612 of the Revenue Act of 1928, which declared that § 1106 (a) was

[1]The legislative history of § 1106 (a) shows that its purpose was not to prevent a taxpayer from voluntarily agreeing to pay a tax after the period of limitation had expired. It was proposed in order to avoid the effect of a decision of the Court of Claims in Toxaway Mills *v.* United States, 61 Ct. Cls. 363, 372, holding that if a tax had been collected after the running of the statute of limitations the taxpayer could not set up that fact as entitling him to recover, but could establish a right to a refund only by proving that there had been an overpayment of the tax, on the theory that the statute of limitations did not extinguish the liability but merely barred the remedy. As

repealed as of February 26, 1926, its effective date. Congress thus indicated its intention that the section should be erased from the books as though it had never been enacted, so that § 278, like other surviving sections of the 1926 Act, must be construed free of such restrictive influence, if any, as § 1106 (a) would otherwise impose. Thus it must be dealt with as was the identical section in the Act of 1924 which was before the Court in *Stange* v. *United States, supra.*[2]

That Congress, with consent of the taxpayer, has power to reinstate his tax liability and to authorize assessment of the tax cannot

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stated in the Conference Report on this section of the bill, H. Rep. 356, 69th Cong., 1st Sess., p. 55:

"This amendment is deemed advisable because of an opinion in a recent decision of the Court of Claims, Toxaway Mills *v.* United States . . . Obviously this section does not apply in the case of fraud or in the case of a waiver."

And see 67 Cong. Rec., Part IV, p. 3531. But in conference § 1106 (a) was qualified by the addition of a clause denying a right to a refund unless taxpayers had in fact overpaid the tax. See Conference Rep., H. Rep. 356, 69th Cong., 1st Sess., pp. 26, 55. Congress, in enacting these provisions, was thus concerned with refunds rather than assessments and obviously did not enact the provision for the purpose of rendering invalid waivers executed after the running of the statute. See also Sen. Rep. 960, 70th Cong., 1st Sess., p. 41; Report of Joint Committee on Internal Revenue Taxation, 70th Cong., 1st Sess., House Doc. No. 139, p. 16.

[2]It is true that § 506 (a) of the Act of 1928 amended § 278 (c) of the Act of 1926 by providing for extension, by consent, of the time within which an assessment might be made only if the consent were given before the expiration of the period of limitation. But § 506 (b) further provided that any such consent, given after the expiration of the period of limitation, should be valid and effective according to its terms if entered into after the enactment of the Act of 1928 and before January 1, 1929. It was also provided, in § 506 (c), that "The amendments made by this section to the Revenue Act of 1926 shall not be construed as in any manner affecting the validity of waivers made prior to the enactment of this Act, which shall be determined in accordance with the law in existence at the time such waiver was filed". The application of subdivision (c) of § 506 is by its terms limited to amendments made by the section and it seems plain that it was intended to be a qualification of subdivision (a) and not a limitation upon § 612. Compare United States *v.* Morrow, 266 U. S. 531. Thus construed it prevents any retroactive operation of subdivision (a) by saving the effect of waivers already given although after the expiration of the period of limitation. That effect is to be determined by the application of the provisions of the Act of 1926, with § 1106 (a) eliminated as provided by § 612 of the Act of 1928. The declared purpose of § 506 was to preserve the Commissioner's rights to waivers filed

be doubted. *Graham & Foster* v. *Goodcell*, 282 U. S. 409, 426; *Mascot Oil Co.* v. *United States*, 282 U. S. 436. The taxpayer cannot complain that Congress has availed itself of the consent which he has given, and cannot object that it did so by revival of the tax "liability," rather than by removing the bar of the statute as in *McDonnell* v. *United States, supra*, and *Stange* v. *United States, supra*; see *Wm. Danzer & Co.* v. *Gulf R. R.*, 268 U. S. 633, 636; *Home Insurance Co.* v. *Dick*, 281 U. S. 397, 409.

We have considered, but do not discuss respondent's arguments based on the construction of the waiver of November 6, 1926, which are without merit. We do not doubt that rightly construed the waiver conformed to the requirements of §§ 278 and 280 of the Act of 1926, and that by it respondent consented to the deficiency assessment.

Reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.

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under prior acts and to fix January 1, 1929, as the date of change from the old practice to the new. See H. Rep. 2, 70th Cong., 1st Sess., p. 29; Sen. Rep. 960, 70th Cong., 1st Sess., p. 36; Conference Rep., H. Rep. 1882, 70th Cong., 1st Sess., p. 21. If subdivision (c) were construed as a limitation upon § 612 it would nullify the operation of § 612, and would produce a "whimsical result." See Commissioner of Internal Revenue *v.* Oswego & Syracuse R. R. Co., 62 F. (2d) 518, 520. For waivers executed after the period of limitation had run would be valid if filed prior to February 26, 1926, the effective date of the 1926 Act. Like waivers would be invalid if executed between February 26, 1926, and May 29, 1928, the effective date of the 1928 Act. But by § 506 (b), supra, they would be valid if executed between May 29, 1928 and January 1, 1929. Scope is given for the operation of § 612, see Bernier *v.* Bernier, 147 U. S. 242, 246, and incongruous results are avoided by treating § 1106 (a) as though it had never been a part of the 1926 Act, as § 612 directs. See United States *v.* Katz, 271 U. S. 354.